TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No 263.

MUTUAL RESERVE FUND LIFE ASSOCIATION, APPELLANT,

vs.

JAMES S. PHELPS AND FIDELITY TRUST AND SAFETY VAULT CO.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED MARCH 5, 1903.

(18,437.)

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Proceedings of the circuit court of the United States for the district of Kentucky at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, October 1st, A. D. 1900.

Present: Hon. Walter Evans, sitting as circuit judge.

MUTUAL RESERVE FUND LIFE ASSOCIATION, Complainant,
vs.
JAMES S. PHELPS ET AL., Defendants. } No. 6821.

Be it remembered, that heretofore, to wit, on the 23rd day of August, A. D. 1900, came the complainant, by counsel, and filed in the clerk's office of our said court, its bill of complaint, in the above-styled cause.

And on the same day, to wit, on the 23rd day of August, 1900, the following order was entered:

This day came the complainant, by Pirtle & Trabue, its counsel, and moved the court for a temporary injunction and restraining order against the defendants as prayed for in its bill of complaint. Came also the defendants, James S. Phelps and The Fidelity Trust and Safety Vault Company, by Zack Phelps and B. F. Washer, their counsel, and entered their appearance to said motion.

It is ordered that said motion be set for hearing August 25th, 1900.

The bill of complaint above referred to is as follows:

The bill of the Mutual Reserve Fund Life Association filed in the United States circuit court for the sixth circuit and district of Kentucky against James S. Phelps and the Fidelity Trust and Safety Vault Company.

To the judges of the United States circuit court for the sixth circuit:

Humbly complaining, your orator, The Mutual Reserve Fund Life Association, showeth unto your honors:

2 1. That it is a corporation duly organized under and pursuant to the provisions of the statutes and laws of the State of New York, with its principal office in the city of New York, in the State of New York, and a citizen of said State of New York; and that the defendant, James S. Phelps, is a citizen of the State of Kentucky, and an inhabitant and resident of the district of Kentucky, and the defendant, The Fidelity Trust and Safety Vault Company, is a corporation created by an act of the General Assembly of the Commonwealth of Kentucky, with its principal office in the city of Louisville, in said district of Kentucky, and is a citizen of Kentucky, and an inhabitant of the district of Kentucky.

2nd. That the amount in dispute between the complainant and

the defendants in this suit exceeds the sum or value of two thousand dollars, exclusive of interest and costs.

3. That your orator is a corporation duly created and organized under chapter 267 of the Laws of 1875, of the State of New York, and chapter 175 of the Laws of 1883, of the State of New York, for the purpose of, and it has at all times been carrying on the business of life insurance upon the mutual, co-operative or assessment plan, deriving its revenue solely from the voluntary donations of its members, and issuing to its members certificates of membership under and by virtue of which, and under and subject to the articles of incorporation and the constitution or by-laws of the association, certain benefits may accrue to such members.

That long and prior to October 10th, 1899, your orator had complied with the laws of the Commonwealth of Kentucky in such cases made and provided for carrying on in the said State its business authorized by its aforesaid articles of association, and had thereafter obtained in said State as certificate or policy holders and members a great many persons holding certificates in divers amounts, in some instances exceeding the sum of ten thousand dollars, which certificate-holders of your orator in order to maintain in full force and effect said certificates, paid to your orator at stated periods in each year certain dues and assessments made upon the holders of said certificates to raise money to pay death losses accruing under simi-.ar certificates upon the death of members respectively, and that such payments on and immediately prior to the 10th day of October, 1899, accruing to your orator by virtue of the terms of such certificates exceeded the sum of fifty thousand dollars per annum.

That on said October 10, 1899, the insurance commis-
3 sioner of the State of Kentucky cancelled the license which had been theretofore issued by said State to your orator to carry on the business in the State of Kentucky, and gave written notice to your orator that from and after that date all authority granted by his department to your orator and all licenses issued by him to the agents of your orator to do business in the State of Kentucky, were thereby revoked; and from and after said date, namely, October 10th, 1899, your orator has had no agents or agent in the said State of Kentucky, and has not been permitted by the laws, or the insurance commissioner of the said State, to have any agent in the said State to do any business whatever therein, and has done no business whatever in said State of Kentucky; but at one time, for the convenience of those holders of certificates aforesaid who reside in Jefferson county, State of Kentucky, although its certificates of membership provide that the dues and assessments payable thereunder shall be paid to your orator at its home office in the city of New York, has permitted them either to remit dues and assessments directly to your orators at its home office in the city of New York aforesaid, or through the Western bank located in the city of Louisville aforesaid.

4. That the defendant, The Fidelity Trust & Safety Vault Company, assuming to be the receiver appointed by the Jefferson circuit court of Jefferson county, State of Kentucky, has given to all persons

known to said company holding the certificates of membership aforesaid, a notice in writing advising them that it has been appointed receiver in Kentucky of all the business and assets of your orators, and requiring them to pay to it all premiums, dues and assessments which they may owe, or which may hereafter become due to your orator from them until ordered by the court to the contrary, and warning the said holders of such certificates that any payment of any such sums to your orator would make them liable to another payment of like sum to said company giving said notice, as well as subjecting the payors to punishment by the said Jefferson circuit court for contempt consisting in disobedience of its orders.

Your orator shows unto your honors that there is no sum whatever due or owing from the said holders of said certificates, or any of them, to your orator, and that there was no such sum due or owing when said notice was given by the said defendant to the holders of said certificates or when the said court assumed to appoint said defendant receiver as aforesaid, but that all payments of such dues or
4 assessments provided in the certificates held by such members, or by the constitution or by-laws of your orator, are optional with said certificate-holders, and necessary to preserve and keep alive their rights under such certificates; but that nevertheless the said notice and threats of the said defendant to the said certificate-holders is demoralizing and alarming them, and causing them to fear punishment by the said Jefferson circuit court if they pay said dues and assessments to your orator, and is thereby deterring them from making such payments, and from preserving and keeping alive their valuable rights existing under their certificates, to the irreparable damage and injury of your orator and the holders of its certificates aforesaid.

5. That the said defendant, The Fidelity Trust & Safety Vault Company, is no receiver of said court, nor any other officer thereof, because the said court has no jurisdiction of your orator in the case in which it assumed to appoint said defendant company its receiver, but that the defendant, James S. Phelps, on the ordinary docket of said court file- his petition naming your orator as a defendant, praying judgment against your orator that he might recover back certain sums of money which he has paid to your orator aggregating the sum of $1994.20, and causing a summons to be issued upon the said petition on or about the 28th day of February, 1900, which summons could not be served in the said State of Kentucky, because of the previous action of the insurance commissioner of said State in cancelling the license which had been issued to your orator to do business in said State, and revoking a copy of the said summons to be delivered to one B. Frese, a man unknown to your orator, but who your orator is informed is in some way connected with the said Western bank, through whom, as aforesaid, the holders of certificates were, at one time permitted to transmit to your orator the dues and assessments provided for in their certificates, but who was not then, and never was, an agent or officer of your orator, and caused another copy to be delivered to the insurance commissioner of Kentucky, who, while your orator was permitted to transact its business

in Kentucky, had been appointed its agent for service by a certain power of attorney, which, however, had been revoked and annulled long prior to the attempted service upon said insurance commissioner aforesaid; wherefore said alleged service of the said summons was void and of no effect. Your orator further shows that after the delivery of said copy of said summons to said Frese and said insurance commissioner, the said court, acting upon the
5 assumption that your orator had been summoned as a defendant in said action and made default, rendered, on the 19th day of May, 1900, a judgment without trial of the merits of the claim made by the said Phelps against your orator, your orator never having appeared in said action, or been served with process therein, that the said Phelps recover of your orator the said sum of $1994.20 with certain interest thereon, aggregating on the 18th day of May, 1900, $2360. That thereafter, to wit, May 21st, 1900, a writ of *fi. fa.* issued from the office of the clerk of said court directed to the sheriff of said county, commanding him to make out of the estate of your orator the said sum, with costs of such action, and that afterward, to wit, June 12th, 1900, the plaintiff's attorney in said action placed upon the said execution a direction in these words: "The sheriff is directed to return this *fi. fa.* in accordance with the facts, June 12th, 1900," and that on the said day the sheriff returned the said writ to the office of said clerk endorsed "No property found out of which to make this *fi. fa.* or any part thereof."

That afterward, to wit, August 4th, 1900, the said Phelps filed in the said court a paper-writing bearing the style of said case, and entitled "Amended and supplemental petition," reciting the facts aforesaid, and averring that your orator then was, and for more than fifteen years next preceding had been, issuing policies of life insurance, for which it received dues, premiums and assessments and had been engaged in such business in Kentucky and that in December, 1899, the insurance commissioner of Kentucky had cancelled the authority of your orator to issue new policies, or make new contracts, and that thereafter your orator withdrew from Kentucky all its agents and employés. That prior to December, 1899, policyholders in Kentucky paid all moneys due your orator to local collectors and treasurers in said State, and that after December your orator revoked their authority to longer receive anything of value belonging to your orator, and instructed all of the said policy-holders and your orator's debtors in Kentucky to forward directly to its home office in New York whatever they owed, or might owe, to your orator; and that all this was done pursuant to a fraudulent scheme of your orator, which scheme the said Phelps assumed to set out in detail too elaborate here to repeat. Wherefore the said plaintiff prayed a decree in aid of, and in the enforcement of, his so-called judgment and a general attachment of your orator's property, and that all persons connected with your orator appear before the
6 commissioner of said court and disclose all of its property or equitable interests, or, if said court should deem proper, a receiver be appointed to take charge of the business assets and property, of your orator in Kentucky, or which it might obtain in Ken-

tucky, and that all revenues and incomes accruing to your orator from policy-holders or other debtors be ordered paid to said receiver.

That no process issued upon the said paper, and that your orator has never appeared thereto, but that immediately upon its being filed in said court, said court, without any notice to your orator, or to any of its agents or officers, or anybody who even assumed to represent it, promulgated an order appointed the Fidelity Trust and Safety Vault Company a receiver of all the assets and estate of your orator in Kentucky, and ordered it to collect and receive all moneys, debts, things in action and credits then owing, or thereafter accruing to your orator, and to take and hold any and every interest, privilege, or franchise which your orator might then own or thereafter acquire, and to take possession of all the revenue and income which might accrue, or that might thereafter accrue to your orator from its business in said State and from its policy-holders and specifically directed all persons insured in your orator, and all its debtors in Kentucky, to pay to said so-called receiver all dues, premiums and assessments, and whatever else of value might then or thereafter be or become owing or due to your orator; and warned all persons or policy-holders that any disobedience on their part of said order, or failure to comply with the provisions thereof, should make them liable to summary proceedings and punishment for contempt, &c., &c.

6. That there are largely over one thousand holders of the aforesaid certificates of membership residing in Kentucky whose certificates represent over three millions of dollars, and that the defendant company is threatening to, and unless restrained and enjoined by the order of this court will, institute actions against said certificate-holders, or otherwise proceed against them to collect and obtain the dues and premiums and assessments which they would pay to your orator under the terms of the said certificates, the payment whereof is essential to preserve and keep alive their rights and the insurance evidenced by the said certificates, that the premiums, dues and assessments payable to your orator from its members in Kentucky on or before August 31, 1900, aggregate many thousands of dollars, and that the action of defendants would prevent your orator's receiving such
7 dues, premiums and assessments, aggregating largely exceeding two thousand dollars exclusive of interest and costs, and that the injury and damage which would accrue to your orator, unless the injunction herein prayed be granted, would largely exceed the sum of two thousand dollars, exclusive of interest and costs; that the institution by the said receiver of actions or other proceedings against the said certificate-holders in Kentucky would cause and create an enormous amount of costs, and unnecessary and unjustifiable waste of the money which would otherwise be paid to your orator, and that an injunction issued by your honors is indispensable to prevent a multiplicity of such actions and waste of the moneys which would be paid to your orator as aforesaid, and the annoyance and harrassing of the said certificate-holders.

That your orator is engaged in business in many States of the United States and is — possession of a large surplus, and is collecting a very large revenue from such dues, premiums and assessments, and that such revenue is indispensable to enable it to maintain its organization and to fulfill and perform the obligations of its certificates of membership; and the confidence of its certificate-holders and of the public is indispensable to enable it to carry on business and to perform its obligations; and that the multiplicity of suits by the so-called receiver and his repeated assertion of the right to collect from such certificate-holders dues, premiums and assessments *in* inspiring *to* the public and the holders of the certificates of membership aforesaid a lack of confidence in the stability and financial strength of your orator and its methods of business, and ability to perform its contracts, and is thereby degrading it in the estimation of the public and of its members, and producing to it great and irreparable injury and damage.

7. Your orator has appeared specially in the Jefferson circuit court in the case or proceeding based upon the so-called amended and supplemental petition, for the sole purpose of filing its petition and bond for removal of, and for removing the said case or proceeding to this court, and tendered its said petition and bond for removal, but the said court has refused and declined to permit that your orator even to file the said petition and bond for removal, and declared that your orator had no right to file the said petition or bond, and that said court would retain jurisdiction of said case; said petition shows the diverse citizenship of your orator and the defendants aforesaid; that the amount in controversy ex-
8 ceeds, exclusive of interest and costs, two thousand dollars, and otherwise conforms to the laws of the United States. Copies of said petition and bond are exhibited herewith and made a part of this bill; and your orator shows that nevertheless, and notwithstanding any power which could possibly have been derived by the said receiver from the order of the said court, if any, would instantly have ceased upon the presentation of the said petition and bond the said receiver is still threatening to collect the dues, premiums and assessments aforesaid, and to take possession of the property and assets of your petitioner, and to cause the said certificate-holders to be punished by the said court as for contempt and disobedience of its orders if they should pay to your orator such dues, premiums and assessments.

8. That unless the said dues, premiums and assessments which the said so-called receiver is threatening to collect, the payment whereof to your orator is forbidden by the so-called order of the said Jefferson circuit court under penalty of punishment for contempt of court in disobedience of its orders and processes, be paid to your orator when payable according to the terms of the certificates of membership, which said dues, premiums and assessments will begin to mature and be payable on or before the first day of September, 1900, your orator will be deprived of the revenue and income which would otherwise accrue to it, and which is necessary to enable it to maintain its organization and to perform its obligations to such certifi-

cate-holders, and the said certificate-holders will be deprived of their interests and property in and under the said certificates and be without any means or ability to preserve or save the valuable interests and property for which they have been paying in said dues, premiums and assessments in the past; whereby the property of your orator and the said certificate-holders would be taken by the said State court through the instrumentality of the so-called receivership without due process of law, in violation of the provisions of the fourteenth amendment to the Constitution of the United States.

Your orator exhibits with this bill as a part thereof, duly certified copies of the proceedings consequent upon the said amended and supplemental petition including the said paper, and also certified copies of the record in said case of James S. Phelps against your orator, in which the said Jefferson circuit court assumed to render a judgment against your orator as aforesaid, so that there is exhibited herewith certified copies of all the proceedings which
9 the said Phelps took in said State court against your orator; and your orator also exhibits as part of its bill the circular which the said receiver sent as aforesaid to your orator's members in Kentucky, marked Exhibit X.

In consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and is only relievable in a court of equity, where matters of this kind are properly recognizable and relievable.

Your orator prays the aid of this honorable court, and that it may please your honors to grant unto your orator a writ of injunction commanding the said defendants, and each of them, and all persons claiming to act under their authority, or the authority, direction or control of either of them, to absolutely desist and refrain from taking possession of or in anywise interfering with, any of the assets or estate of your orator in the State of Kentucky, and from collecting or receiving any moneys, things in action, credits, income or revenues now owing to or hereafter to accrue to your orator, and especially the dues, premiums and assessments payable to your orator by its members by virtue of the terms of their certificates of membership, and from taking or instituting any action or other proceedings against said members, or any of them, to collect or realize such dues, premiums or assessments, or to prevent them, or any of them, from paying over to your orator, according to the stipulations and provisions of their certificates of membership, all dues, premiums and assessments payable according to the tenor thereof, until otherwise ordered by your honors; and that upon final hearing the injunction herein prayed be made perpetual.

And it may please your honors to grant unto your orator a subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the said James S. Phelps, and The Fidelity Trust and Safety Vault Company, the defendants, respectively, commanding them, on a day certain therein to be named, and under a certain penalty, to be and appear before this honorable court, then and there to answer, but not under oath, answer under oath being hereby expressly waived, all and singular

the premises, and to stand to, perform and abide by such order, direction and decree as may be made against them in the premises as shall seem meet and agreeable to equity and good conscience.

10 And your orator, as in duty bound, will ever pray, &c.

GEORGE BURNHAM, JR.,
S. T. TYNG,
PIRTLE & TRABUE,
Counsel for Complainant.

Edmund F. Trabue, being duly sworn, says he is one of complainant's counsel, and its officers and agents are all absent from this district; that the averments of the bill based on records are true, and the other averments on information he believes to be true.

EDMUND F. TRABUE.

Subscribed and sworn to before me this 23rd day of August, 1900.

THOS. SPEED, *Clerk.*

Upon which bill of complaint there issued the following process:

The President of the United States of America to James S. Phelps & The Fidelity Trust & Safety Vault Company, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America, for the district of Kentucky, at the Federal court hall in the city of Louisville, on the first Monday in October next, to answer a bill in equity exhibited against you in our said court, by the Mutual Reserve Fund Life Association, which you shall in nowise omit, under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court hereto affixed, at the clerk's office of said court, in Louisville, this 23rd day of August, A. D. 1900, and in the 125th year of our Independence.

Attest:

THOS. SPEED,
C. C. C., K. D.,
By HENRY F. CASSIN,
His Deputy.

MEMORANDUM.—The defendants are to enter their appearance in the suit in the clerk's office on or before the 1st day of October next, the day at which the writ is returnable, otherwise the bill may be taken *pro confesso.*

[SEAL.]

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN,
His Deputy.

11 Upon which the marshall made the following return:

Executed on the Fidelity Trust & Safety Vault Co. by delivering a true copy to John Stites, president, this Aug. 28, 1900; on Jas. Phelps, by delivering a copy to him this Sept. 18, 1900.

A. D. JAMES, *U. S. M.*,
By M. C. JAMES, *D. M.*

And on another day of said term of said court, to wit, on the 25th day of August, A. D. 1900, the following judgment was entered:

The parties this day appeared, by their counsel of record, and the motion of the complainant for a temporary injunction and restraining order coming on to be heard, the complainant read in support thereof the bill and exhibits and the affidavits of Chas. K. Lehrberg and Ely D. Graff, and the defendants read a stipulation in writing signed by counsel of the parties respectively, and the matter was thereupon argued by counsel, and upon consideration thereof, and being fully advised, the court delivered an opinion in writing, which is ordered to be filed, and pursuant thereto it is ordered, adjudged and decreed that, pending the final determination of this cause, or until the further order of the court herein, the defendants, James S. Phelps and The Fidelity Trust and Safety Vault Company, and all its officers and agents, are severally hereby enjoined and restrained from collecting or attempting to collect and from reducing or attempting to reduce to possession and from in anywise interfering with or claiming any of the revenue or income of the complainant derived from any of the dues, assessments, mortuary calls or premiums which have accrued or which may accrue or be made upon any of the certificates of membership or policies of life insurance issued by complainant to any person or persons whatsoever, but the defendant, James S. Phelps, is left at full liberty to proceed otherwise to enforce against any other property or assets of the complainant any judgment he may have against the complainant by all lawful writs or processes as he may be advised.

The clerk will issue writs of injunction commanding the defendants accordingly upon the complainant executing a bond in the penalty of $2500.00, conditioned according to law.

12 STATE OF KENTUCKY, }
County of Jefferson. }

Pleas before the Honorable Sterling B. Toney, judge of the Jefferson circuit court, law and equity division, at the court-house in the city of Louisville, county and State aforesaid, and on the dates hereinafter mentioned.

JAMES S. PHELPS, Plaintiff, }
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION, Defendant. }

Transcript of Record.

Be it remembered, that heretofore, to wit, on the 28th day of February, 1900, came plaintiff, by counsel, and filed his petition and

two exhibits herein. Said petition is in words and figures as follows, to wit:

Jefferson Circuit Court Division.

JAMES S. PHELPS, Plaintiff,
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION, Defendant.

Petition Ordinary and Exhibits.

The plaintiff, James S. Phelps, states that the defendant, The Mutual Reserve Fund Life Association, is a corporation organized and existing under a charter, constitution and by-laws granted it by the laws of the State of New York, and as such corporation is vested with power to sue and be sued, contract and be contracted with, and to carry on the business of a mutual assessment life insurance company. The plaintiff states that the defendant is now and for many years past has been doing business and exercising corporate functions and powers in this State, and has now in Kentucky both an agent to superintend its affairs and an agent upon whom service of process may be had.

The plaintiff states that heretofore, to wit, on the 8th day of July, 1885, he made application for membership in the defendant association, by which he sought a policy or certificate of insur-
13 ance from the said association, the same to be an indemnity upon his life in the sum of five thousand dollars. The plaintiff states that said application for membership and insurance was by the defendant association approved and accepted, and thereafter, to wit, on July 16th, 1885, in consideration of said application and the further consideration hereinafter stated, the defendant association issued and delivered to the plaintiff a certificate of policy or written contract of insurance, duly signed by the officers of said association, bearing the seal of the corporation and numbered 34999 on the books of said company.

The plaintiff states that the consideration and mutual promises of parties to the said written contract of insurance are set forth in the said contract of insurance and were and are in part as follows:

"In consideration of the application for this certificate of membership, which is hereby referred to and made a part of this contract, and of each of the statements made therein, which, whether written by his own hand or not, every person accepting or acquiring any interest in this contract hereby adopts as his own, admits to be material and warrants to be full and true, and to be the only statements upon which this contract is made; and in further consideration of the admission fee paid, and of the dues for expenses to be paid on or before the sixteenth day of July in every year, during the continuance of this certificate, and of the further payment of all mortuary assessments, payable at the home office of the association in the city of New York, within thirty days from the first week day of the months of February, April, June, August, October and December of each and every year during the continuance of this certificate

for from such other periods as the board of directors may from time to time determine) and within thirty days from the day of the date that each assessment is ordered, the Mutual Reserve Fund Life Association, from and after the delivery thereof, with a receipt for the payment of the first annual dues signed by the president, secretary or treasurer of the association, does hereby receive James S. Phelps, of Louisville, county of Jefferson, State of Kentucky, as a member of said association.

Within ninety days after receipt of satisfactory evidence to the association of the death of the above-named member during the continuance of this certificate of membership upon the following conditions, there shall be paid to Lucy C. Phelps (sister), of Louisville, county of Jefferson, State of Kentucky, if living at the
14 time of said death, otherwise to the legal representatives of said member, the sum of five thousand dollars, from the death fund of the association, at the time of said death, or from any moneys that shall be realized to the said fund from the next assessment to be made as hereinafter set forth, and no claim shall be otherwise due or payable, except for the reserve fund as hereinafter provided.

I. If at such date, as the board of directors of the association may from time to time fix or determine for making an assessment, the death fund is insufficient to meet existing claims by death, an assessment shall then be made upon every member whose certificate is in force at the date of the last death assessed for, and said assessment shall be made at such rates, according to the age of each member, as may be established by said board of directors, and the net amount received from such assessment (less twenty-five per cent. to be set apart for the reserve fund), as provided in the constitution and by-laws of said association, shall go into the death fund.

Said policy or written contract of insurance is filed herewith, marked "Exhibit Policy," and made a part hereof.

The plaintiff states that the policy and contract aforesaid was issued and delivered by the defendant association under and by virtue of the powers vested in it by the constitution and by-laws of the Mutual Reserve Fund Life Association, a copy of which is filed herewith and made a part hereof, marked "Exhibit Constitution and By-Laws." Section 4 of article 2 of the said constitution and by-laws reads as follows:

"The corporate powers of the association shall be vested in the board of directors, who shall have power to adopt such rules and regulations as they deem necessary, not inconsistent with this constitution and by-laws, and to amend the same; and to fix the amount and rate of assessments, fees and dues; and to enact rules and regulations for the government of officers and employés, and for the management of the affairs of the association."

Section 5, article II, of said constitution and by-laws is in the following terms:

"On the first week day of the months of February, April, June, August, October and December of each year (or at such other dates as the board of directors may, from time to time, determine) an as-

sessment shall be made upon the entire membership in force, at the date of the last death of the audited death claims prior thereto for such a sum as the executive committee may deem sufficient
15 to meet the existing claims by death, the same to be apportioned among the members, according to the age of each member."

Plaintiff states that under the policy contract which he held with the defendant association, and under the constitution and by-laws of the said association, both hereinabove referred to, the defendant has now and at all times hereinafter mentioned had the power and authority to fix the amount and rate of assessments, fees and dues of the members, and to make an assessment upon every member whose certificate is in force at the date of the maturity of a demand against the association, such assessments to be made at such rates, according to the age of each member, as may be established by the board of directors of said association. Plaintiff states that the power and authority of the defendant association in the matters of assessments was and is limited and restricted to an assessment or assessments made upon the entire membership of the association, apportioned according to the age of each member, and that the defendant association does not now and has never possessed any power, right or authority to make any classification of its entire membership or part of said membership, save and except such as is based upon the age of its members, and such classification must be uniform and each and every member of the association of the same age must be, under plaintiff's policy contract and the association's constitution and by-laws, assessed and charged the same amount for equal amounts of insurance in force.

Plaintiff states that he continued a member of the defendant association, under and by virtue of his contract of membership and insurance as above mentioned, from July 16th, 1885, until the time of the defendant's acts as hereinafter complained of; during the continuance and existence of the plaintiff's contract with the defendant he promptly paid every assessment made and all dues and fees charged against him, and that in the discharge of his liabilities to the defendant association, and in the liquidation of its fees and assessments, he has paid to the defendant the sum of $1,994.20, the dates and amounts of such payments being shown specifically by a statement filed herewith as part hereof, marked "Exhibit Account." Plaintiff states that the payments made by him to the defendant association, as shown by the account above referred to, were made upon mortuary calls or bi-monthly assessments, and the amounts thereof were demanded of this plaintiff by the defendant to be paid within thirty days from the date of said call. Plaintiff states that said mortuary calls or bi-monthly assessments, as shown by
16 the amounts of the exhibit aforesaid, were not made upon every member of the defendant association of the same age as this plaintiff, but that the same *was* made upon an alleged classification of members of the defendant association based upon the length of time the policy of such member had been upon the books of the association.

Plaintiff states that the classification made by the defendant aforesaid, and upon which was based the mortuary calls or bi-monthly assessments made by the defendant and paid by this plaintiff during the years 1898, 1899 and in January, 1900, was in furtherance and in execution of a fraudulent plan and wrongful conspiracy of the defendant association to defraud the plaintiff of his rights under the contract of insurance which he then held with said association. Plaintiff states that at the time of such calls or bi-monthly assessments he was beyond the limit where he could secure other insurance or indemnity upon his life; that he had been a member of the association for many years, and had paid into the association large amounts of money; that his expectancy of life was small and the claim arising out of his policy with the defendant was nearing maturity.

Plaintiff states that acting upon the fraudulent plan above mentioned, the defendant association assigned this plaintiff to a class, the members of which were similarly situated as the plaintiff, and that the object and purpose of the defendant in making such classification was to force out of the association this plaintiff and other members of the class aforesaid, or require of such members the payment of exorbitant and excessive sums largely in excess of the amount which, under the plaintiff's contract of insurance and the association's constitution and by-laws, could be charged or assessed against this plaintiff and other members of said class. Plaintiff states that the classification aforesaid and the mortuary calls and assessments made thereunder were but an attempt upon the part of the defendant to defraud this plaintiff of his rights and the confiscation of his property; that such classification and assessment were not authorized by the plaintiff's contract of membership and insurance in the defendant association, or by the constitution and by-laws of the defendant association; but, on the other hand, said classification and assessments were directly contrary to the terms and agreements of the plaintiff's contract with the defendant and in conflict with the constitution and by-laws of the association. The plaintiff states that the defendant was organized as a mutual life insurance company, and was empowered by its charter to do only a
17 mutual life-insurance business; but plaintiff states that notwithstanding such provision of its charter and such limited powers, and notwithstanding the agreements contained in the contract of insurance existing between this plaintiff and defendant, the defendant association has repeatedly discriminated among its members of the same age, and has repeatedly charged different premiums and assessments against members of the same age and properly belonging to the same class; and that the defendant has charged and assessed against this plaintiff a larger sum than it charged and assessed against other members of the same age as this plaintiff, and properly belonging to the same class as this plaintiff. The plaintiff states that such classification and such assessment and such absence of mutuality were illegal and unjust; that the same were made and the acts complained of done without his knowledge or consent, and were and are in violation of his contract and in fraud of his rights.

Plaintiff states that the defendant in violation of its contract with this plaintiff has recently transferred many of its members to a plan of insurance radically different from the one in force at the time his contract of insurance was taken out with the defendant, and under which he continued a member of said association. Plaintiff states that the defendant without the knowledge or consent of this plaintiff has abandoned insurance on the assessment plan and is now writing policies on a legal reserve basis and upon the plan of the old-line life insurance companies with stipulated premiums. Plaintiff states that the defendant has no right or authority under its charter, constitution or by-laws to write insurance on any other plan than the assessment plan, and that the proceedings in soliciting and issuing policies on the legal reserve or straight life-insurance basis is in violation of its charter, constitution and by-laws and in violation and fraud of the rights which this plaintiff has under and by virtue of the same. Plaintiff states that the defendant has already induced many of its members to abandon their certificates of membership on the mutual or assessment plan and to accept certificates or policies of insurance on the straight insurance plan, and on a plan other than that of a mutual or assessment plan, and that the said association is now using every effort to transfer its members from the assessment to other and different plans of insurance. Plaintiff states that the direct result of the classification above complained of and the change of methods and plans for the conduct of defendant's business was and is to lessen the number of mem-
18 bers liable to assessment and call to meet the mortuary demands upon and the expenses of the association and to charge upon this plaintiff and other members continuing policies on the assessment plan more than his or their just proportion of the losses paid by the association and expenses incurred by it and further to diminish the prospects of this plaintiff and other persisting members of securing a settlement of his or their claims against the defendant arising out of the maturity of their policy contract.

Plaintiff further states that it was stipulated and agreed in his said policy of insurance that:

"The net earnings of the association, together with 25 per cent. of the receipts from each assessment shall constitute a reserve fund which shall be deposited with the trust company and be securely invested in United States bond mortgages or other interest-bearing securities by said trust company, as trustee, for the exclusive benefit of the members of the association and the interest on the same as it accrues shall be placed by said trustee to the credit of the death fund. The reserve fund above one hundred thousand dollars and in excess of sums represented by outstanding bonds may be applied to the payment of claims in excess of the American experience tables of mortality, and when any claim by death is due to making up any deficiency that may exist in the death fund."

The charter and by-laws of the defendant association also provide that at no time should any portion of said reserve fund be used for any purpose other than the purpose named; that the policy-holders of said association should receive the benefits from said reserve fund

and that the same should be used as stated in said policy so as to reduce the assessment of the policy-holders of said association. Plaintiff states that the defendant has willfully and fraudulently violated this provision of its contract in that it has failed to maintain said reserve fund as provided in said contract and has fraudulently used money belonging to said fund for purposes other than those provided in said contract, thereby increasing the assessments of this plaintiff.

Plaintiff states that it was further agreed and stipulated in his contract and policy of insurance that:

After the expiration of each period of five years during the continuance of this certificate of membership a bond will be issued bearing interest at the rate of four per cent. per annum payable annually to the death fund for an equitable portion of the reserve fund and the principal of the said bond shall be available ten years
19 from its date towards paying future dues and assessments under this certificate, and should membership hereunder cease by death or otherwise any portion of said principal thus used shall be applied to increase the bonds of the next quinquennial apportionment to other members of the association holding certificates issued during the same years as this certificate and at which apportionment the rate of assessment may be changed to correspond with the actual mortality expense of the association."

Plaintiff states that the defendant has wilfully and fraudulently violated its contract with this plaintiff in that it has not complied with its agreement to issue said bonds at the expiration of each period of five years, and that no bond has been issued by the defendant, to this plaintiff. Plaintiff states that instead of issuing to him bonds as agreed and required by his said contract, the defendant has issued to him "a bond statement," purporting to be the amount of the reserve fund to which this plaintiff was entitled; that the issuance of said bond statement in lieu of the bond was in violation of the contract between plaintiff and defendant and in fraud of plaintiff's rights. Plaintiff states that the defendant has not honestly or fairly represented or stated the correct amount of the reserve fund to which this plaintiff was and is entitled. Plaintiff states that a large number of policies were forfeited to the defendant or allowed to lapse by members of the defendant, but that the defendant has failed to apply the proportion of the said fund to which the holders of said forfeited or lapsed policies were entitled, to increasing the fund proportioned to this plaintiff as indicated in the bond statement above referred to, and has failed to account to this plaintiff in any way for his proportion of such fund. Plaintiff states that the defendant has wrongfully and fraudulently used and applied said fund to other purposes and uses, and that such action on the part of the defendant was and is in violation and in fraud of the right of this plaintiff.

Plaintiff states that the defendant has used a large proportion, to wit, the sum of two million dollars of the mortuary fund of the association in expenses and in other ways foreign to the uses and purposes for which said fund was created.

Plaintiff states that said mortuary fund was under his contract with defendant and the charter, constitution and by-laws of the association a trust fund for the payment of death losses and that the misappropriation and misapplication of such fund by the defendant was in violation and in fraud of the plaintiff's contract with defendant and his right under the same.

20 Plaintiff states that in his said contract or policy of insurance the following stipulation was contained:

"Within thirty days from the first week day of the months of February, April, June, August, October and December, of each and every year during the continuance of this policy there shall be payable to the association a mortuary premium for such an amount as the executive committee may deem requisite, which amount shall not exceed the maximum rates endorsed thereon according to the age of each member and the net amount received to be dealt with as provided in the constitution or by-laws of the association or provided under the terms of this contract."

Plaintiff states that notwithstanding said agreement the defendant has repeatedly exceeded the amount of the mortuary premium at its maximum rate as endorsed upon the back of his contract in its demands upon this plaintiff. He states that such mortuary premiums demanded and collected as aforesaid were in violation and fraud of his contract, with defendant, and his rights under the same.

Plaintiff states that by reason of the repeated violations by the defendant of the terms and conditions of his policy contract with it, and the repeated breaches which the defendant has been guilty of with respect to said contract, that said contract has been canceled, annulled and renounced by the defendant and this plaintiff is entitled to and should receive a return of the money which he has paid defendant as hereinbefore set forth.

Wherefore plaintiff prays judgment against the defendant in the sum of $1994.20, with interest on the various amounts going to make up said sum from the dates of the payment of such various amounts to the defendant association. Plaintiff prays for his costs herein expended, and for all other and further relief, general, equitable and special.

ZACK PHELPS,
BENJ. F. WASHER,
Att'ys for Plaintiff.

STATE OF KENTUCKY, }
County of Jefferson, } *ss:*

James S. Phelps states that he is the plaintiff in the foregoing petition and that the allegations and statements contained therein are true, as he believes.

JAMES S. PHELPS.

Subscribed and sworn to before me by James S. Phelps, this 23rd day of Feb., 1900. My commission expires Jan. 8, 1902.

M. E. McLOUGHLIN,
Notary Public, Jefferson County, Kentucky.

My commission expires January 8th, 1902.

21 Thereupon the clerk issued summons and copy to Franklin county, which said summons is as follows:

Jefferson Circuit Court.

The Commonwealth of Kentucky to the sheriff of Jefferson county, Kentucky:

We command you to summon Mutual Reserve Fund Life Association to answer a petition filed against it in our Jefferson circuit court by James S. Phelps, No. 24371, and warn it that upon failure so to do for twenty days after service hereof, if in Jefferson county, or for thirty days if elsewhere in the State, judgment may be rendered by default, or answer compelled, or proof taken at petitioner's option; and make due return hereof within sixty days from date hereof.

Witness John H. Page, clerk of said court, this 28th day of February, 1900.

JOHN H. PAGE, *Clerk*,
By FRANK DACHER, *D. C.*

Sheriff's return on foregoing summons is as follows:

Executed on the Mutual Reserve Fund Association by delivering to W. H. Stone, insurance commissioner of the State of Kentucky, at Frankfort, a true copy of the within summons this March 1st 1900.

D. F. SUTER, *S. F. C.*,
By J. W. SUTER, *D. C.*

And thereupon the clerk issued alias summons and copy, which said summons is as follows:

Jefferson Circuit Court.

The Commonwealth of Kentucky to the sheriff of Jefferson county, Greeting:

We command you to summons Mutual Reserve Fund Life Association to answer a petition filed against it in our Jefferson circuit court by Jas. S. Phelps, No. 24371, and warn it that upon failure so to do, for 20 days after service hereof, if in Jefferson county, or for thirty days if elsewhere in the State, judgment may be rendered by default or answer compelled, or proof taken at petitioner's option; and make due return hereof, within sixty days from date hereof.

Witness John H. Page, clerk of said court, this 1st day of March, 1900.

JNO. H. PAGE, *Clerk*,
By M. RYAN, *D. C.*

22 Sheriff's return on foregoing summons is as follows:

Executed the within process by delivering a copy thereof to Ben Frese, he being the managing agent and chief officer and agent of the Mutual Reserve Fund Life Association found in this county.

This March 1, 1900.

W. L. DOOLAN, *Special Bailiff.*

I hereby appoint W. L. Doolan a special bailiff to execute the within writ.

H. A. BELL,
Sheriff J. C.,
By J. A. LUDWIG, *D. S.*

Affiant W. L. Doolan states that he is a white male person over 16 years of age, not interested in this action nor related to any of the parties thereto, and that the return hereon is true.

W. L. DOOLAN.

Subscribed and sworn to before me by W. L. Doolan, this 29th day of March, 1900.

JOHN H. PAGE, *Clerk.*

At a court held on the 14th day of April, 1900.

This action having been set at rules on the 9th day of April, 1900. Came the defendant by counsel and filed the affidavit of J. S. Pirtle herein. The defendant enters its appearance especially for the sole purpose of moving, and it does move, the court to quash. 1. The return of W. B. Doolan, special bailiff, on the summons herein served on B. Frese. 2. The return of the sheriff of Franklin county on the summons herein served on W. H. Stone, insurance commissioner. And on further motion of defendant by counsel, said motions be and are assigned to April 23rd, 1900, for hearing.

Said affidavit of James S. Pirtle filed on the 14th day of April, 1900, is as follows:

Jefferson Circuit Court, Law and Equity Division.

JAMES S. PHELPS, Plaintiff,
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION, Defendant. } Affidavit.

James S. Pirtle, states that he is one of the attorneys of the defendant to this action. That the defendant has no agent in
23 Jefferson county, Kentucky, known to the affiant. That the license of the defendant to do business in the State of Kentucky expired prior to the time of the bringing of this action, and the service of the summons on the insurance commissioner in the State of Kentucky, and said association had been and was prior to said time excluded by the said insurance commissioner from doing business in Kentucky, and said defendant was not at the time of the service of the summons herein upon the said insurance commissioner doing business in the State of Kentucky, and had no licensed agent in the State of Kentucky at said time.

That C. K. Lehrberg was the last agent of the said defendant designated by it as the person upon whom process should be served, and that on or about the 1st of October, 1899, the license of said C. K. Lehrberg to act as agent for the defendant was revoked by the insurance commissioner of the State of Kentucky.

And affiant further states that B. Frese upon whom summons was

served was not at the time said summons was served upon him an agent or officer of the defendant and never has been such agent or officer.

JAMES S. PIRTLE.

Subscribed and sworn to before me by James S. Pirtle this 14th day of April, 1900. My commission expires on the 6th day of January, 1904.

ATTILLA COX, JR.,
N. P., J. C., Ky.

At a court held on the 23rd day of April, 1900.

On motion of defendant and by consent of parties by counsel, it is ordered by the court that this action be and is reassigned to April 26, 1900, for hearing of pending motions herein.

At a court held on the 26th day of April, 1900, came defendant by counsel and filed the affidavit of Chas. W. Camp and certain exhibits, to be read on the motion to quash the return on the summons.

And said motions having been heard it is considered and adjudged by the court that said motions to quash the return on the summons be and they are hereby overruled, to which the defendant excepts.

Said affidavit of Chas. W. Camp and exhibits are missing from the papers and cannot be copied herein.

24 At a court held on the 5th day of May, 1900, came plaintiff by counsel and filed his affidavit herein, and it is ordered that said affidavit is filed *nunc pro tunc* as of April 26, 1900.

Said affidavit of plaintiff filed on the 5th day of May, 1900, is as follows:

Jefferson Circuit Court, Law and Equity Division.

J. S. PHELPS, Plaintiff,
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION, Defendant. } Affidavit.

The affiant, J. S. Phelps, states that he is the plaintiff in this action, and that his relations with the defendant association are and have been as set forth in this petition herein filed.

Affiant states that on November 1st, 1899, August 30th, 1899, and January 2nd, 1900, he paid to the defendant mortuary calls Nos. 105, 106, 107; that said payments were made to B. Frese, who represented himself as the local treasurer of the Mutual Reserve Fund Life Association, said money being paid to him and received by him in such official capacity. Affiant states that said Frese on the occasions mentioned and on a great many occasions prior thereto accepted the payment of money owing to the Mutual Reserve Fund Life Association, and executed and delivered to this plaintiff a receipt signed by George W. Harper, treasurer, and countersigned by B. Frese, local treasurer. Such receipts for the dates mentioned are filed herewith as a part of this affidavit.

Affiant states that the B. Frese mentioned above is the same person upon whom service of process was had in this action as Ben Frese, chief officer and managing agent in this county of the defendant association.

J. S. PHELPS.

Subscribed and sworn to before me by J. S. Phelps, this April 28th, 1900. My commission expires Jan'y 8th, 1902.

M. E. McLAUGHLIN,
N. P., J. C., Ky.

Said exhibits filed with the foregoing affidavit are as follows, to wit:

Mutual Reserve Fund Life Association (incorporated).

Frederick A. Burnham, president.

Mutual Reserve building, 305, 307, 309 Broadway, New York.

Received of James S. Phelps this — day of ——, 1899, eighty-four $\frac{66}{100}$ ($84.66) in payment of mortuary call No. 107 on policy No. 34999, subject to the terms and conditions endorsed hereon and of said policy contract, and to all agreements and conditions relating thereto.

GEORGE W. HARPER, *Treasurer.*

Above payment made within time.
This receipt countersigned on this 2 day of January, 1900, by B. Frese, local treasurer.

NOTICE.—This receipt shall not be valid and local treasurers are not authorized to issue same unless payment of the mortuary call for which it is given is actually made in cash within the time stated in the notice for such mortuary call.

Foregoing exhibit endorsed as follows:
Terms and conditions.—Members may remit, annually or semi-annually in advance, and avoid lapsing their policies, special deposit receipts will be sent for such payments. In the event of the death of the member, any excess of the sum paid in advance after deducting all indebtedness is returnable to the beneficiary.

Mortuary calls are made upon the members of the association on the first week day of the months of February, April, June, August, October and December of each year. All mortuary calls are due and payable at above dates respectively, and must be paid within thirty days of such dates or the policy will expire. Annual dues are due and payable on the dates stated in the policy (without grace). Mortuary calls and annual dues are payable only at the home office of the association in the city of New York or to an authorized local treasurer, whose name is stamped on the notice, who is furnished with a receipt signed by the treasurer of the association which must be duly countersigned.

The acceptance of the foregoing mortuary call shall not be
26 held to waive any forfeiture caused by non-payment of any previous sum when due or otherwise. Remittances must be paid by valid draft, check, post-office or express money order, and any credit made or receipt given is conditioned on payment of such draft, check, post-office or express money order on presentation; and if not so paid any credit made or receipt given shall be null and void; cash sent by mail or payments made to agents or other persons whose names are not stamped on the notice, are unauthorized, and at the members' own risk.

Agents or local treasurers are not allowed to make, alter or discharge contracts, grant credits or waive forfeitures.

At a court held on the 19th day of May, 1900:

This action having heretofore been submitted upon a motion to quash the service of process. Upon which motion the court made the following findings of law and facts which are incorporated in and made a part of this judgment, to wit:

First. Upon proof induced by affidavits the court was and is of the opinion that Ben Frese at the time of service of summons upon him in this action was the local treasurer of the defendant association in Jefferson county, Kentucky, and as such was an agent of the company upon whom summons might be served, and the defendant association thereby brought before the court. By the summons herein upon the said Ben Frese, the defendant association was brought before this court in this action, and the jurisdiction of this court to grant the relief prayed for in the petition became vested.

Second. It appearing from proof induced by affidavits that the defendant association did by resolution of its board of directors adopted prior to the service of summons in this action, consent that service of process upon commissioner of insurance of this State in any action, brought or pending in this State, should and shall be a valid service upon said defendant association, and it further appearing to the court that the authority and power to receive service of process thus vested in the commissioner of insurance of Kentucky has never been revoked, cancelled or annulled, this court held and now holds that the summons served upon the commissioner of insurance of Kentucky, in this action was a valid and sufficient service, and operated to bring the defendant association before the court and subject said defendant association to the jurisdiction and decrees of this court in this action.

27 This action having now been regularly set at rules and called by the court and the necessary time for answer having elapsed without any action being taken by the defendant the cause was regularly submitted for judgment. The court being advised by the uncontroverted allegations of the petition that the prayer of said petition should be granted; it is, therefore, ordered and adjudged that the plaintiff recover of the defendant the sum of nineteen hundred and ninety-four ($1994) dollars, with interest on the various amounts going to make up said sum from the dates of the payments of such various amounts to the defendant association as

shown by the itemized statement and account filed with the petition; amounting in all to twenty-three hundred and sixty ($2360.00) dollars, with interest from this date, May 19th, 1900, and that plaintiff further recover of defendant his costs in this action expended, for all of which debt, interest and costs the plaintiff may have immediate execution.

At a court held on the 4th day of August, 1900:

Came the plaintiff, James S. Phelps, by Zack Phelps and B. F. Washer, his attorneys, and presented to the court his amended and supplemental petition, which is now ordered filed and this action transferred to the equity docket; and it appearing to the court that the process of attachment sought by the prayer of plaintiff's amended and supplemental petition involves a multiplicity of parties and a burdensome and expensive proceeding which, as appears to the court, can be avoided and the rights of all parties concerned better subserved by the appointment of a receiver in lieu and instead of the attachment as prayed.

It is now, therefore, ordered, decreed and adjudged that the Fidelity Trust and Safety Vault Company be and it is hereby appointed receiver of the Mutual Reserve Fund Life Association in Kentucky, and of all the assets and property of the Mutual Reserve Fund Life Association in Kentucky of whatever description and wherever located. The said The Fidelity Trust and Safety Vault Company as receiver is hereby authorized, empowered and instructed to take possession of all assets and estate of the Mutual Reserve Fund Life Association in Kentucky; collect and receive all moneys, debts, things in action and credits now owing to or hereafter to accrue to the said Mutual Reserve Fund Life Association in Kentucky, and to take and hold any and every interest, privilege and franchise, together with all other assets of every kind,
28 which the said association may now own, or may hereafter acquire in Kentucky. Said receiver shall take into possession all the revenue and income which has accrued or may hereafter accrue to the defendant from its business in this State and policy-holders; all persons insured in said Mutual Reserve Fund Life Association and all other debtors of said association in Kentucky are now specifically ordered and directed to pay to the receiver herein appointed all dues, premiums, assessments and whatever else of value may now be or hereafter become owing or due to the said defendant association. And all policy-holders, all persons insured and all other debtors as aforesaid are now warned that any disobedience on their part of this order, or failure by them to comply with the provisions of this decree, shall make them liable to summary proceedings and punishment for contempt. All property, moneys and assets coming into the hands of the receiver herein appointed shall be held by him to the further administration by the court of said property and funds for the following purposes:

First. To the satisfaction in full of the judgment held by plaintiff against defendant hereinbefore referred to, with interest. Second. To the costs and expenses of the receivership, including reasonable

compensation to the receiver and proper fees to his counsel. Third. To the costs of this action. When such judgment shall be paid, and such expenses and costs liquidated, the receivership provided for herein shall terminate. The receiver shall make reports to the court of all his acts and proceedings at such time or times as the court shall direct.

In carrying out this decree and order, the receiver is authorized and empowered to employ counsel, engage assistants, and incur such other expense as may be necessary to the proper and efficient execution of the trust herein imposed upon him. Said receiver may institute and prosecute all such suits at law and in equity as may be necessary, and to defend any action which may be instituted against him or affect property in which he as receiver has an interest.

All persons are hereby enjoined and restrained from interfering with the receiver herein appointed in the custody, management and control of the property, assets and rights hereby impounded and placed in the hands of said receiver for the purposes and objects hereinbefore stated. The receiver shall qualify by executing bond with its capital stock as surety in the sum of $3000.

STERLING B. TONEY, *Judge.*

29 Then came the Fidelity Trust and Safety Vault Company, appointed receiver of the Mutual Reserve Fund Life Association in Kentucky, by the foregoing order, and qualified by executing bond with its capital stock as surety, which bond is now approved by the court, and the said Fidelity Trust and Safety Vault Company is instructed to and does now enter into the active execution of the trust provided for in the foregoing order.

STERLING B. TONEY, *Judge.*

Jefferson Circuit Court, Law and Equity Division.

JAMES S. PHELPS, Plaintiff,
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION, Defendant.

Amended and Supplemental Petition.

The plaintiff, James S. Phelps, comes, and by leave of court, filed his amended and supplemental petition, and states that as appears from the record of this cause, — instituted this action in the Jefferson circuit court against the defendant, The Mutual Reserve Fund Life Association, which action has been duly docketed in this division of the court. Plaintiff states that in this said action proceedings had been had *to* the result that on May 19th, 1900, a judgment was duly rendered by this court adjudging a recovery in favor of this plaintiff against the defendant, The Mutual Reserve Fund Life Association, in the sum of two thousand three hundred and sixty dollars ($2360.00) with interest from May 19, 1900. Thereafter, to wit, on May 21st, 1900, the clerk of this court issued upon said judgment an execution of *fieri facias*, directed to the sheriff of Jefferson

county, Kentucky, commanding that officer to make out of the estate of the Mutual Reserve Fund Life Association the amount of the judgment which this plaintiff recovered against it. Said execution was as stated, directed to the sheriff of Jefferson county, Kentucky, which county was the one in which the action aforesaid was instituted and the judgment hereinbefore mentioned was rendered and said officer was the proper one to execute the process aforesaid. The plaintiff states that the above-mentioned execution of fi. fa.
30 was duly placed in the hands of the sheriff of Jefferson county to whom the same was directed, who at the time made the following endorsements thereon: Came to hand May 21st, 1900, at 2.45 p. m. Afterwards, to wit, on the 12th day of June, 1900, the following endorsement was placed upon said execution by plaintiff's attorneys: "The sheriff is directed to return this *fi. fa.* in accordance with the facts, June 12th, 1900."

Plaintiff states that thereafter, to wit, on June 12th, 1900, and before the return day thereof, the above-mentioned execution or fi. fa. was by the sheriff of Jefferson county, Kentucky, returned with the following endorsement on the back thereof: "No property found out of which to make this fi. fa. or any part thereof. H. A. Bell, S. J. C., by E. R. Bate, D. S.

Said execution is a part of the record in this action and is referred to and made a part of this petition for further particularity.

The plaintiff states that the judgment on which the execution hereinbefore referred to was issued has never been superseded, annulled or reversed, and the same is now in full force and effect; that no part, principal or interest has been paid, that the same is wholly due and payable.

Plaintiff states that the defendant, The Mutual Reserve Fund Life Association, is now, and for more than fifteen years past has been, an insurance company issuing policies of life insurance for which it receives dues, premiums and assessments from parties insured. Plaintiff states that for many years prior to December, 1899, the defendant was engaged in its business—life insurance—in the State of Kentucky; with agents conducting its affairs, canvassing for new business, receiving moneys due the company and otherwise attempting to promote its interest and protect its rights. Plaintiff states that in December, 1899, the insurance commissioners of the State of Kentucky cancelled and annulled the power, right and authority to longer canvass for new business or thereafter to issue new policies of insurance or make any new contracts or agreements in this State. After the annullment and cancellation of defendant's right and authority as aforesaid, the Mutual Reserve Fund Life Association withdrew from Kentucky all of its agents and employés who had previously been engaged by it in the transaction and conduct of its business. Plaintiff states that prior to December, 1899, policy-holders in Kentucky paid all moneys due defendants to local collectors and treasurers located in this State for the purpose of receiving funds due and accruing to the defendant associa-
31 tion. After December, 1899, the defendant revoked the authority of such collectors and treasurers to longer receive

anything of value belonging or coming to said association, and defendant instructed all the policy-holders and debtors in Kentucky to forward directly to the home office in New York whatever such policy-holders and debtors owed or might hereafter owe to the said association.

Plaintiff states that each and all of the acts and proceedings of the defendant, The Mutual Reserve Fund Life Association, in this State since December, 1899, have been in pursuance and prosecution of a plan and scheme prepared and pursued by the said defendant for the purpose of preventing suits being instituted and tried in this State by citizens thereof holding claim against it, and for the further purpose of cheating and defrauding Kentucky creditors of their rights, claims and demands against the association aforesaid.

Plaintiff states that since December, 1899, the defendant has continued to do business in this State and that it has continued in force policy contracts of insurance on which it has collected and does now collect large sums of money from citizens of Kentucky. That the defendant has now in this State a large number of policy-holders who at stipulated times and regular intervals became indebted to the defendant association in various sums, which are due and owing and became due and owing to the defendant as dues, premiums and assessments on policies of insurance. The parties thus indebted to the defendant, the amounts of such indebtedness are not known to this plaintiff, but in good conscience and equity all moneys owing and accruing to the defendant from residents of this State, or so much thereof as may be necessary to satisfy the judgment hereinbefore mentioned, should be employed to the satisfaction and settlement of the claim of this plaintiff against the defendants as set forth above.

Plaintiff states that it is a fraud upon his rights and an attempted evasion of the process of this court for the defendant association to annually receive large sums of money from the citizens of Kentucky, and at the same time contend and protest that it is not doing business in this State, and is not subject to any process of a court of Kentucky. Plaintiff states that for many months past the defendant has been taking and removing from this State and from the jurisdiction of this court its property and assets for the purpose and with the intent of fraudulently preventing this plaintiff from
32 recovering on a judgment rendered by this court in his favor as before herein stated, and of further cheating and defrauding this plaintiff of his claim against the defendant as vested in him by the judgment aforesaid.

Plaintiff states that the business of the defendant in this State together with all the assets it owns in Kentucky and its debts and demands which it may now or hereafter hold against the residents and citizens of this State shall be attached, impounded and sequestered by proper order of this court, and employed in the satisfaction and settlement of his claim against the defendant as particularly hereinbefore set forth.

Wherefore the plaintiff prays for a decree in aid of and in the en-

forcement of the judgment heretofore rendered in this court, and to this end plaintiff prays that a general attachment issue against the property of the defendant, The Mutual Reserve Fund Life Association; that the defendant and all persons now or heretofore connected with said defendant be required to appear before the commissioner of this court, and disclose any money, choses in action, equitable or legal interest, and all other property to which the defendant is entitled *to* or to which it has an interest; or if it seems best to the court, the plaintiff prays that a receiver be appointed to take charge of the business, assets and all other property of every kind and description which the defendant has in Kentucky, or may hereafter obtain in this State, that all revenues and incomes accruing to the defendant from policy-holders and other debtors be ordered paid to said receiver; and that so much as may be necessary of any money or property belonging to the defendant as may by an order or process come within the jurisdiction of this court be employed to the settlement and satisfaction of the judgment which the plaintiff holds against the defendant, as set forth and mentioned herein. Plaintiff prays for his costs in this action, and for all other relief, general, equitable and special.

ZACK PHELPS AND
B. F. WASHER,
Att'ys for Pl'ff.

B. F. Washer states that he is one of the attorneys for the plaintiff herein, that the plaintiff, James S. Phelps, is now absent from the State of Kentucky and county of Jefferson, and that the foregoing statements of this amended and supplemental petition are true as he verily believes.

B. F. WASHER.

33 Subscribed and sworn to before — this 4th day of August, 1900, by B. F. Washer. My commission expires on January 12, 1902.

FREDERICK FORCHT, JR., *N. P., J. C.*

And on the 4th day of August, 1900, the following bond was executed and filed in the clerk's office:

COMMONWEALTH OF KENTUCKY, }
Jefferson County. }

Jefferson Circuit Court, Law and Equity Division.

JAMES S. PHELPS, Plaintiff,
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION, Defendant. } No. 24371. Bond.

We, Fidelity Trust and Safety Vault Company, principal, and its capital stock as surety, bind ourselves to the Mutual Reserve Fund Life Association in the sum of three thousand ($3,000.00) dollars

that the said Fidelity Trust and Safety Vault Company, as receivers will faithfully discharge all of its duties as such, and will comply with the judgment and orders of the court in the action, and will account for, pay and deliver to the said Mutual Reserve Fund Life Association all moneys or property due or belonging to it when required.

Witness our hands this 4th day of August, 1900.

FIDELITY TRUST & SAFETY VAULT COMPANY,
By JOHN STITES, *President.*

At a court held on the 22nd day of August, 1900:

Came Attilla Cox, by counsel and tendered and moved the court to file his petition for advice herein, to which the plaintiff objects and the court being advised, overruled said motion, to which Attilla Cox excepts.

Came defendant, by counsel, and tendered and moved the court to file its petition and bond for removal of this case to the United States circuit court, to which the plaintiff objects.

Ordered by the court that said motion be, and is, submitted.

34 Said petition for removal tendered on the 22nd day of August, 1900, is as follows:

Jefferson Circuit Court, Law and Equity Division.

JAMES S. PHELPS, Plaintiff,
against
MUTUAL RESERVE FUND LIFE ASSOCIATION.

Petition to Remove this Case to the United States Circuit Court for the District of Kentucky.

To the honorable Jefferson circuit court, law and equity division:

Your petitioner, The Mutual Reserve Fund Life Association, appearing for the sole purpose of filing this petition and the accompanying bond, and not waiving the objection to the jurisdiction of this court over it, respectfully states that it is named as the defendant in the above-entitled action; that said action is of a civil nature, and that the amount in dispute therein, exclusive of interest and costs, exceeds the sum or value of $2,000, and is the amount plaintiff claims therein, viz: $2,360, with interest from May 18th, 1900.

That it is an equitable action apparently based, or sought to be maintained, upon the statutory authority of section 439 of the Code of Practice in Civil Cases, based upon a return made by H. A. Bell, sheriff of Jefferson *circuit* county, upon a certain execution of *fieri facias*, which plaintiff claims issued from the office of the clerk of this court on or about the 21st day of May, 1900, directed to the said sheriff commanding the said sheriff to take the goods and chattels of your petitioner to the said sum of $2360, with interest from May 19th, 1900, which the said plaintiff assumed to have recovered of your petitioner under a certain judgment of this court, dated May

19th, 1900, which your petitioner is advised was without process, and utterly null and void, the said return of the said sheriff being "No property found out of which to make this *fi. fa.* or any part thereof;" and in said action or suit, said plaintiff, as a basis for attachment, or receiver, asserts that petitioner has been guilty of certain acts, which he denominates as done for the purpose of cheating
35 and defrauding the plaintiff, all of which claims of the plaintiff your petitioner will controvert in said United States circuit court, if said court shall retain jurisdiction of your petitioner.

Your petitioner further states that it is, and at the time of commencement of this action was, a corporation duly created and organized under and pursuant to the laws of the State of New York, with its principal office and place of business *is* in the city of New York, in said State of New York, and a citizen of said State of New York, and that the plaintiff, James S. Phelps, is, and at the time of the commencement of this action was, a citizen of the State of Kentucky, and an inhabitant of the district of Kentucky.

And your petitioner offers herewith a bond, with good surety, conditioned according to law, for your petitioner entering in said United States circuit court, on or before the first day of its next regular session, a copy of the record in this suit, and for paying or causing to be paid all costs that may be awarded therein by said United States circuit court, if said court shall hold that said suit was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays that this court proceed no further herein, except to accept the said petition and bond, and approve the said bond; and your petitioner will ever pray, &c.

MUTUAL RESERVE FUND LIFE ASSOCIATION,
By PIRTLE & TRABUE, *Attorneys.*

Edmund F. Trabue states that he is one of the attorneys of the petitioner, and that all of its officers and agents are absent from Jefferson county, Kentucky, and that the statements contained in the foregoing are true as he verily believes.

EDMUND F. TRABUE.

Subscribed and sworn to before me by Edmund F. Trabue, this 22nd day of August, 1900.

JNO. H. PAGE,
Clerk, Jefferson Circuit Court.

36 Said bond for removal, tendered on the 22nd day of August, 1900, is as follows:

Jefferson Circuit Court, Law & Equity Division.

JAMES S. PHELPS, Plaintiff,
against
MUTUAL RESERVE FUND LIFE ASSOCIATION.

Know all men by these presents that we, Mutual Reserve Fund Life Association, principal, and Edmund F. Trabue, surety, are held

and firmly bound unto James S. Phelps, plaintiff in the above-entitled cause, his executors, administrators and assigns, in the sum of two hundred and fifty dollars ($250.00), lawful money of the United States of America, for the payment of which, well and truly to be made, we and each of us bind ourselves and each of us, our heirs, executors and administrators, jointly and severally by these presents.

The condition of this obligation are such that whereas, the said Mutual Reserve Fund Life Association has petitioned the said Jefferson circuit court, law and equity division, in and for Jefferson county, State of Kentucky, for the removal of a certain cause therein pending, wherein James S. Phelps is plaintiff and said Mutual Reserve Fund Life Association is denominated defendant, to the United States circuit court for the district of Kentucky, for further proceedings on grounds in said petition set forth.

Now, therefore, if your petitioner aforesaid shall enter in the said United States circuit court for the district of Kentucky, on or before the first day of its next regular session, a copy of the records in said suit, and shall pay or cause to be paid the costs that may be awarded herein by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise shall remain in full force and effect.

Witness our signatures this 22nd day of August, 1900.

MUTUAL RESERVE FUND LIFE ASSOCIATION,
By EDMUND F. TRABUE, *Attorney.*
EDMUND F. TRABUE.

37 At a court held on the 23rd day of August, 1900:

The court being advised, it is considered and adjudged that defendant's motion to file its petition and bond for removal of this case to the United States circuit court, be and the same is hereby overruled, to which the defendant excepts.

The affidavit of Charles K. Lehrberg, above referred to, is as follows:

United States Circuit Court, District of Kentucky.

MUTUAL RESERVE FUND LIFE ASSOCIATION, Plaintiff,
against
FIDELITY TRUST & SAFETY VAULT CO., &c., Defendants. } 6821.

Affidavit of Charles K. Lehrberg.

Charles K. Lehrberg states that for eleven years prior to October, 1899, when the insurance commissioner of Kentucky canceled the license of the complainant, The Mutual Reserve Fund Life Association, he had been general agent and representative of that association in Kentucky. That the association was then doing a flourishing business in Kentucky; that its insurance in force in that State approximating three and one-half millions of dollars; that it was held by over one thousand members, and that the annual income

from said members in annuel dues and assessments equaled or exceeded $75,000; that affiant has not accurate information as to the amount of policies lapsed since or of the cancellation of such insurance, but is satisfied that he would be safe in saying that at least two-thirds of such insurance then existing in Kentucky is in force, and that the annual income of the said association from such members is at least fifty thousand dollars, and affiant believes that it is much greater than that amount. Affiant further states that the mortuary call made by said association on its members, which is call No. 111, was payable August 1, 1900, with the option to the member- to pay it any time on before August 31, 1900; that upon failure of the members to pay the said call on said August 31, 1900, the policy upon which the call is made will lapse, so that the said August 31, 1900 is the last day of grace for payment of said
38 call to entitle said policy-holders to keep alive the said policies and preserve their rights thereunder. Affiant attaches hereto, as a part of this affidavit, the notice received by him as a holder of a certificate of membership No. 32090.

Affiant further states that all the certificates of membership issued by the said association are not on the same plan, but that under all of them the insurance is renewable, at the option of the member, and that no personal liability attaches to any member to any of the dues or assessments, and that the payment of the dues and assessments are not coercible by the association. That said nature of such insurance is made known by the agents of the association, and has ever since he has had knowledge of its methods been made known to persons becoming members of such association, whenever the question has arisen, and that in the more recent certificates of membership, which are those more largely in force than any others in the State of Kentucky, and which have been in use as long as eight or ten years to the knowledge of affiant, it is provided expressly as follows: "No personal liability is incurred by becoming a member of this association. This contract is a bi-monthly term insurance renewable at the option of the member upon payment of premiums at the times and in the manner herein provided, and all premiums received, however payable, are applicable *pro tanto* to the bi-monthly renewal of this contract."

Affiant states that immediately upon the cancellation of complainant's license by the insurance commissioner of Kentucky, the power of attorney of affiant and all other agents of the association known to affiant was revoked, but that since August 4, 1900, a great many of the holders of certificates of membership in said association, knowing that affiant had been its agent, have called upon affiant to ascertain what should be done by them in view of the notice received by them from the Fidelity Trust and Safety Vault Company, being a notice like that filed with the bill of complaint in this case, and expressing great perplexity as to what course to pursue. That some of such persons have expressed to affiant the fear that they might make a mistake and thereby forfeit their policies if they failed to pay to the association calls made upon them by it, but also expressing the fear that if they failed to pay to the receiver they should

thereby incur liability to punishment for contempt of the orders of the Jefferson circuit court. That some of such policy-holders have expressed to affiant their inclination to drop their policies and permit them to lapse as the only way
39 out of the dilem-a presented by the notice received from the Fidelity Trust and Safety Vault Company. That the demoralization and feeling of uncertainty aroused by the said company's communication has been very great and widespread among the members of the association, and that affiant is convinced that unless the question to whom such payments should be settled a sufficient length of time before August 31, 1900, to enable the dues and assessments payable on or before that date to be made by that date, a great many members will be so demoralized that they will permit their policies to lapse, and that the association will thereby lose a large amount of business and money which they would otherwise receive as dues and assessments aggregating many thousands of dollars, and largely exceeding two thousand dollars, exclusive of interest, and that thereby such members will lose insurance which they have been carrying for years, and which has been growing more valuable to them as they have grown older.

That the amount of dues and assessments upon such policies as would lapse, and which would be lost to the association, would not be susceptible of exact computation, but would aggregate many thousands of dollars as aforesaid in the State of Kentucky, and that the injury which would result to the association if an injunction were not granted to prevent the acts threatened by the said trust company would exceed many times the said sum of two thousand dollars, exclusive of interest. That the said association transacts a life-insurance business on the co-operative or assessment plan; that it operates in many States of the United States, and derives its revenues solely from voluntary contributions of its members, and from its investments, and that its success is dependent entirely upon the confidence of the public, and that the action of the Jefferson circuit court in appointing a receiver and of the receiver in sending the notices hereinbefore mentioned, a specimen copy of which is filed as an exhibit with the bill of complaint, to the holders of certificates of membership in Kentucky, and the threats of the receiver to proceed against the members of the association in Kentucky to collect dues and assessments, and to cause them to be punished for contempt of the State court in event of the contingencies expressed in the notice, have caused and are causing the association great and irreparable injury, and will continue so to do as long as it shall last. That the said association is amply solvent and absolutely able to pay
40 all its liabilities in full, and that the fear that instability in its financial condition inspired in its members by the acts of the said trust company is an injustice to the association and its members with the natural result of the actions of the said court, and the said trust company.

Affiant attaches hereto, as part of this affidavit, four specimen copies of policies in general use by the association, one called "twenty-payment option policy," a second called "twenty-five-year term ex-

tendible," and a third called "whole life," and so marked, respectively, and a fourth number "128937."

The last has been in use about ten years, the other three for a lesser time.

Charles K. Lehrberg says that the statements contained in the foregoing affidavit are true to the best of his knowledge and belief.

C. K. LEHRBERG.

Subscribed and sworn to before me this 25th day of August, 1900. My commission expires January 6, 1904.

ATTILLA COX, JR.,
Notary Public, Jefferson Co., Ky.

The affidavit of Ely D. Graff, above referred to, is as follows:

United States Circuit Court, District of Kentucky.

MUTUAL RESERVE FUND LIFE ASSOCIATION, Plaintiff,
vs.
FIDELITY TRUST AND SAFETY VAULT CO., &c., Defendants. } 6321.

Affidavit of Ely D. Graff.

Ely D. Graff says that he is and for many years has been the general agent and principal representative of the American Express Company in Louisville, Kentucky; that he is the holder of two certificates of membership of the complainant association. That the first certificate was issued about fifteen years ago for three thousand dollars, and the other seven or eight years ago for one thousand dollars. That he has received from the Fidelity Trust and
41 Safety Vault Company two circular papers, one a typewritten letter and the other what purports to be a printed copy of an order of the Jefferson circuit court. That the receipt of those papers has very much perplexed him and caused him to doubt what course to pursue with regard to the payment of dues and assessments under his policy. That he fears that if he fails to pay to the association his policies will lapse, and if he fails to pay to the trust company he will be proceeded against in some way, he does not understand exactly how, for contempt of court. That in his dilem-a he has not yet determined whether or not he can afford to pay at all to either party or even if he should not permit his certificates to lapse. That he has made payments upon his certificates for so long that to let them lapse would cause him great and irreparable injury.

That except for the dilem-a in which the receipt of the trust company's notice placed him he would continue to make his payments to the association and preserve his interests under the certificate. He says that he has seen other members of the association who had received such notices from the trust company, and that he has discussed the situation with them and generally found that they were as much perplexed as to the proper course to pursue as affiant. Ely D. Graff says the statements contained in the foregoing affidavit are true to the best of his knowledge and belief.

ELY D. GRAFF.

Subscribed and sworn to before me by Ely D. Graff this 25th day of August, 1900. My commission expires Jan. 6, 1904.

L. B. BOTTS,
N. P., J. C., Ky.

The stipulation above referred to is as follows:

United States Circuit Court.

THE MUTUAL RESERVE FUND LIFE ASSOCIATION, Complainant,
vs.
THE FIDELITY TRUST & SAFETY VAULT COMPANY, JAMES S. Phelps, Defendants.

42 It is agreed between the complainant and defendants that: The outstanding policies existing between the Mutual Reserve Fund Life Association and citizens of Kentucky were continued in force after the action of October 10th, 1899, of the insurance commissioner of the State ef Kentucky. That said policies were in force continuously up to and including the time of the hearing of the motion to quash the service of summons, and that on said policies the association had collected and were collecting dues, premiums and assessments.

PIRTLE & TRABUE, *For Def't.*

The portion of record filed herein on the 25th day of August, 1900, is as follows:

And on the 26th day of April, 1900, the following affidavit of Chas. W. Camp was filed in court:

STATE OF NEW YORK,
County of New York, Borough of Manhattan, } *ss:*

Charles W. Camp, being duly sworn, deposes and says: I am and have been for more than six years last past the secretary of the Mutual Reserve Fund Life Association. As such secretary it is a part of my duty to keep and record the minutes of the transactions of the board of directors of said association.

Said association is a corporation organized under chapter 175 of the Laws of 1883 of the State of New York, transacting the business of life insurance on the co-operative or assessment plan. In all contracts of insurance made with said association the member or policy-holder is required to remit his dues, premiums or assessments to the home office of the association but the association frequently appoints local treasurers or collectors in cities and towns distant from the home office of said association for the convenience of the members or policy-holders and authorized them to pay said local treasurer or collector instead of remitting direct to the home office of the association. Said local treasurers or collectors are always appointed by resolution of the board of directors, and their sole authority from the association is to receive the dues, premiums or

assessments from such of the policy-holders as reside within the district for which they are appointed local collectors or treasurers. Said local treasurers or collectors are required to comply with the rules and regulations of the association in respect to such treasurers or collectors, and their authority extends no further than is expressed therein.

43 On the 9th day of April, 1896, by a resolution of the board of directors of said Mutual Reserve Fund Life Association, adopted at a meeting held on that day, the Western Bank of Louisville, Kentucky, was appointed a local treasurer for said association. The resolution appointing the said Western bank such local treasurer is recorded in the minutes of the meeting of said board of directors held on said 9th day of April, 1896, in the following words:

"On motion of Director Vrooman, seconded by Director Wells, the Western Bank of Louisville, Kentucky, was appointed a local treasurer to serve as such according to the rules and regulations of the association and during the pleasure of the board — of C. K. Lehrberg, discontinued."

When an assessment is levied by the said association upon its members a list of the members liable therefor is sent to the local treasurer and on the back of said list is printed the rules and regulations of the association governing local treasurers. I annex hereto a blank used by the association in forwarding to such local treasurers the list of members so liable for assessments and on the back of said blank is printed the said rules and regulations which said rules and regulations are those which governed the Western Bank of Louisville, Ky., during the period it served as such local treasurer."

The appointment of said Western bank so made as aforesaid continued until the 12th day of March, 1900, when such appointment was discontinued and annulled.

The said Western bank has never represented the said association in any other capacity than that of local treasurer and its only authority *for* said association was to receive from the members liable to the assessments said assessments when paid in accordance with the terms of the respective contracts held by the said members.

CHARLES W. CAMP.

Sworn to before me this 17th day of April, 1900.

[SEAL.] T. B. CLARKSON,
Notary Public, N. Y. Co.

Know all men by these presents:

At a meeting of the board of directors of the Mutual Reserve Fund Life Association Insurance Company, of the city of New York, in the State of New York, held in the office of the company in said city, on the 10th day of May, 1893, the following resolution was adopted:

44 "Resolved, That the Mutual Reserve Fund Life Association Insurance Company of the city of New York, in the State of New York, having been admitted or having applied for admission to transact business in the State of Kentucky, in conformity with the laws thereof, does hereby consent that service of process upon *and*

any and every agent that is now or may hereafter be acting for said company in Kentucky, or upon the insurance commissioner of said State, shall be valid service upon said company in any action or special proceedings against said company in the State of Kentucky subject to and in accordance with all the provisions of the statutes and laws of said State of Kentucky, now in force, and such other act as may be hereafter passed amendatory thereof and supplementary thereto. And said agent, or said insurance commissioner *are* hereby duly authorized and empowered to acknowledge service or process for and in behalf of said company in the State of Kentucky, in all cases as provided for by the laws of the State of Kentucky, and service of process, mesne or final upon said agent, or said insurance commissioner, shall be taken and held to be as valid as if served upon said company, according to the laws of this or any other State, hereby waiving all claims or writ of error by reason of such acknowledgment or service; and service of process upon such agents, or such insurance commissioner in any county of this State, shall be deemed good and valid, and authorize trial of the cause in the court whence such process issued."

In witness whereof, the said company has to these presents, affixed its corporate seal, and caused the same to be subscribed and attested by the second vice-president and secretary at the city of New York, in the State of New York, on the 10th day of May, A. D. 1893.

[SEAL.] HENRY J. REINMUND,
2nd Vice-President.

F. T. BRAMAN, *Secretary.*

STATE OF KENTUCKY:

Office commissioner of insurance, Frankfort.

Office of insurance commissioner of the State of Kentucky.

FRANKFORT, KY., *October* 10, 1899.

Notice is hereby given that from and after this date, all authority granted by this department to the Mutual Reserve Fund Life
45 Association, of New York, a corporation, organized under and existing by the authority of the laws of the State of New York, together will all licenses issued by this department to agents of the above-named association is revoked.

(Signed) W. H. STONE,
Insurance Commissioner.

(Copy.)

STATE OF KENTUCKY:

Office of commissioner of insurance.

FRANKFORT, *October* 10, 1899.

Charles W. Camp, secretary of the Mutual Reserve Fund Life Association, New York city.

DEAR SIR: I have this day revoked all licenses to agents of your association in this State, as your certificate of authority was not re-

newed when it expired June last. Your company has no authority now to transact business in Kentucky.

Very truly yours,

W. H. STONE,
Insurance Commissioner.

(Copy.)

Insurance department.

FRANKFORT, KY., *March 1st*, 1900.

I, W. H. Stone, insurance commissioner of the State of Kentucky, do hereby certify that I have compared the annexed copies of power of attorney of the Mutual Reserve Fund Life Association revocation of authority of same company and notice of revocation served on sec'y of said Co., with the original on file in this department, and that the same is a correct transcript therefrom, and of the whole of said original. In witness whereof, I have hereunto subscribed my name and affixed my official seal at the city of Frankfort, the day written.

[SEAL.]

W. H. STONE,
Insurance Commissioner,
By WM. E. SWEENEY, *Deputy.*

46 (Copy.)

NEW YORK, *April 9th*, 1896.

Mr. B. Freso, cashier the Western bank, Louisville, Kentucky.

DEAR SIR: It gives me pleasure to advise you that the board of directors have this day appointed the Western Bank of Louisville, Kentucky, as a local treasurer, for that city, such appointment to continue during the pleasure of the board.

The compensation allowed will be two and one-half per cent. (2½ per cent.) upon amounts received and remitted to the home office by New York draft.

Full information will be forwarded to you by due course, and I know it will be your pleasure to be governed by them. The collectors will cause you very little trouble, and I am sure that you will aid us by way of calling the attention of our members, from time to time, to the matter of making payments in accordance with our rules and regulations. Any efforts you may make in this direction will receive the thanks of the home office.

Will you be pleased to signify your acceptance?

This association has made wonderful progress and ranks among the first and foremost of the life insurance companies of the world. We challenge the admiration of our friends and command the respect of our competitors. With best wishes for the success of your institution, I am

Very truly yours, JOHN W. VROOMAN, *Treasurer.*

The Fidelity Trust & Safety Vault Co., receiver in Kentucky of the Mutual Reserve Fund Life Association, 206 Fifth street.

LOUISVILLE, KY., *August* 6, 1900.

DEAR MISS: There is served upon you herewith a true and correct copy of an order entered by the Hon. Sterling B. Toney, in the law and equity division of the Jefferson circuit court on August 4, 1900. As a party interested in and affected by the decree of the court, you are invited to carefully read and consider the printed enclosure.

From a perusal of the court's order, the following facts will be developed:

First. That this company has been appointed receiver in
47 Kentucky of all the business and assets of the Mutual Reserve Life Association of New York.

Second. You are required to and must pay to this company all premiums, dues and assessments, which you may now owe to the Mutual Reserve Fund Life Association, or which may hereafter become due from you to the association. Such payments to this company of debts due the Mutual Reserve Fund Life Association is to continue until you receive instructions from the court to a contrary effect.

Third. Should you after receipt of this notice, pay any money or property of value to the Mutual Reserve Fund Life Association, you make yourself liable to another payment of a like sum or property of the same value to this company, as well as subjecting yourself to punishment by the court for contempt in disobeying its order.

The Fidelity Trust and Safety Vault Company, as receiver, is now ready to receive and receipt for all money and property due or owing to the association hereinbefore referred to.

Respectfully,

FIDELITY TRUST & SAFETY VAULT CO.

Ex. filed Aug. 23, 1900.

The opinion above referred to is as follows:

United States Circuit Court, District of Kentucky.

MUTUAL RESERVE FUND LIFE ASSOCIATION
vs.
JAMES S. PHELPS ET AL. } Opinion.

On the 14th day of July, 1885, James S. Phelps, procured a certificate of membership (otherwise a policy of life insurance) in the complainant association, and at stated periods thereafter paid the dues and the mortuary calls or premiums thereon as stipulated in the certificate. This continued until about January, 1900, a period of nearly fourteen and a half years, and for that length of time, he continuously paid the premiums for carrying the risk. Pursuant to the stipulations of the certificate or policy, as the insurer claimed, the mortuary calls were increased to a higher rate and probably

fixed upon a different plan than the insured thought was
48 permitted by the terms of the certificate, and after the date last named, he refused to pay the increased rates, and on the 28th day of February, 1900, instituted an ordinary action at law, in the State court to recover the entire amount of the calls or premiums so paid by him, together with interest thereon. Upon a service of process, which the State court considered valid and sufficient, judgment in that action was rendered in the plaintiff's favor on May 19th, 1900, for the entire claim then ascertained by the court to be the sum of $2360, for which amount with interest from that date and the cost of the proceeding, judgment was then rendered against the association. It will be seen that this judgment allowed to the insurer no compensation whatever for the risk it had taken and carried for the fourteen and a half years, during which the certificate or policy had been in force, and the premiums and calls had been paid. On the 21st day of May, 1900, an execution of *fieri facias* was issued upon the judgment, and was placed in the hands of the sheriff of the proper county who subsequently, namely, on June 12th, 1900, returned the writ in substance, "no property found." More than sixty days after the judgment, to wit, on the 4th day of August, 1900, the plaintiff in that action filed therein an amended and supplemental petition, seeking to obtain satisfaction of the judgment by subjecting the assets and credits of the insurer in Kentucky, and which consisted of the mortuary calls and premiums afterwards to become due from other insurers upon like certificates or policies, and upon considering this last paper the State court, although no process had been issued upon it, nor any notice of it given to the association on the same day of its being filed, transferred it to the equity docket, acted upon it, and appointed the Fidelity Trust & Safety Vault Company receiver for the complainant in Kentucky, and directed it to collect all the revenues and income from the members or policy-holders, and also ordered them, under threat of contempt, to pay the same as they accrued to the said receiver, although none of them were parties to the action, nor had any of them been summoned to answer as garnishees.

After unsuccessfully attempting to file a petition for the removal of that action to this court, on the 22nd day of August, 1900, and after an equally unsuccessful attempt to have the bond tendered therewith approved by that court as sufficient, the complainant begun this action seeking to enjoin the efforts of the defendants, Phelps and The Fidelity Trust and Safety Vault Co., to reduce any of complainant's revenues or income, to their possession upon
49 grounds set forth in the bill of complaint that the last steps taken in the State court were void, that its policy-holders were very numerous, and a great multiplicity of actions would otherwise result. Whether the judgment in the State court action was valid as being based upon a sufficient service of process we need not inquire at this stage of the proceeding. As the defendants are estopped from denying its validity we shall assume it to be valid for the purposes of the inquiry before us, only remarking that in the late case of Swann *vs.* M. R. F. Life Association, 100 Fed. Rep. 922,

we had occasion to pass upon a somewhat kindred question, though not in that case inquiring into the nature of the agency of a "local treasurer," such as Mr. Frese appears possibly to have been in this case. That may become an important question in the future progress of this case, when the character of his agency, if any, is disclosed, but it is not so at present.

Whether the fund raised by the complainant from mortuary calls and premiums through its manner of insuring is a trust fund for all its members and beneficiaries which cannot be diverted to the benefit of a mere creditor, who is not now a member and for that reason possibly not entitled to participate as such, he not having contributed to the joint fund to be raised upon future mortuary calls, is an important question, though it need not now receive more than an incidental consideration. Ordinarily we might say that such a fund could not be subjected to a creditor's demand in a case like the one in the State court and by process which, if anything, is substantially that of garnishment. In this case, where the mortuary calls as shown by defendant Phelps in his pleading in the State court, are a trust fund to pay the losses of the contributors to it, the matter seems even clearer. Whether a premium or a mortuary call yet to be paid for life insurance, where the policy can only be kept alive by its payment, is a subject of any species of garnishment by creditors in the hands of the policy-holder, is another question which may become of much moment. Ordinarily we would certainly say that it was not a debt due to the insurer at all, nor an asset belonging to it until it was actually paid. The relation of insurer and insured admits of the construction only that the insured may purchase the insurance for a prescribed period by voluntarily and at his option paying the premium. This and the plan of insurance offered by the complainant may be slightly different, but if the mortuary calls are not paid the certificate of membership must in all cases lapse. So that if the policy lapse the insured has got nothing for his money. He has only paid a portion of a debt of the insurer if what he is about to pay for the purchase of insurance for the future is taken from him for another and different purpose. If may be assumed to be at least extremely doubtful whether premiums or mortuary calls, not being in any sense debts, but only a cash payment, for the purchase, at the option of the insured, of some future benefit, can in any sense be garnishable. If they can, the policy-holder will lose and the insurance company gain. The policies and all accumulations, if any, may be forfeited for non-payment to the company and the money, instead of paying for insurance, may be most unjustly diverted to the payment of the insurance company's debt. Justice to the policy-holders and every consideration, therefore, would seem to enforce the conclusion that the accruing premiums or calls cannot be garnisheed by any mere creditor of the company.

Section 720 of the Revised Statutes of the United States forbids the issuing by this court of any injunction against any proceedings in a State court, except in bankruptcy matters. This necessarily means a pending and not a past or terminated suit. The statute is

a wise one, as nothing could be more incongruous and unseemly than for the courts of the United States to attempt to control by their processes the ordinary actions of the State courts. Of course this does not mean that if this court first acquired jurisdiction of a subject-matter, or if a case had been lawfully removed here, that in some instances in support of its own jurisdiction the parties thereto might not be directly operated upon by the court, but the statute otherwise plainly forbids this court to enjoin a proceeding in the State court, and this rule is extended to the officers of that court as an inherent part of it. And this court will not enjoin a proceeding of the State court in this instance if one is there pending. It is, therefore, of the utmost importance to ascertain whether since the final judgment in the ordinary action at law was rendered on May 19th, 1900, there has been any pending proceeding in the State court within the meaning of the law, or whether there is any proceeding now pending there within the meaning of that statute. If the defendants are mere wrong-doers, and if their threatened actions are injurious to the complainant, different results will follow.

Assuming it to be valid, the court is clearly of opinion that from and after the rendition of that judgment on that date that
51 action was *functus officio* for all purposes of pleading. Its force was spent, and all steps attempted to be taken thereafter, except in way of writs for the execution of the judgment, were *coram non judice*, and void. Brown *vs.* Vancleave, 86 Ky. 381; Meadows *vs.* Goff, 90 Ky. 540.

Pursuant to these authorities and many others to the same effect, which might be cited, the filing of the supplemental petition and the action of the court appointing a receiver thereupon will be treated as mere nullities. Into a suit at law that was already terminated by final judgment, and which was therefore off the docket, a supplemental pleading was sought to be injected seeking its enforcement by merely equitable proceedings. No summons was issued upon it. No notice of it was given to the party most interested in it, and it was acted upon and disposed of by the court immediately. No attachment was issued under which property was seized or garnishees summoned as a foundation of possible jurisdiction of a *res* and, in short, the whole so-called supplemental proceeding was an attempt to graft a live branch upon a dead stock. This must be a futile effort. A transfer to the equity docket of what was of no legal vitality did not aid nor strengthen it.

The attempted proceeding was not authorized by any of the provisions of the Civil Code regulating attachments. Those provisions obviously apply to cases altogether different from this. Especially does not section 227 apply. It provides for the case of a garnishee actually summoned as such in the action whose answer is not satisfactory. In that event a supplemental petition may be filed in the original case, which, indeed, as to him has never been terminated by final judgment. Here there is nothing in the slightest degree resembling that, as no attachment was issued nor garnishees summoned.

Nor do sections 298 and 299 of the Civil Code (ed. '99) authorize

the appointment of a receiver in such a case, and certainly not in such a manner.

Assuming, for the purposes of this motion only, that the judgment of May, 1900, was valid, and regarding the action in the State court as having terminated at the time of its rendition, and as thereafter only providing support to writs for the collection of the judgment, or for a separate suit in equity under section 439 of the Code, the petition for the removal came too late, though whether the necessary jurisdictional amount is involved, may present at some time an interesting question. The judgment was for $2360 and interest thereon from its date and for costs. Whether the more than
52 $360 of interest manifestly included in the $2360 then merged into and became part of the principal in the sense of the removal acts may yet demand attention. At present, however, it seems immaterial.

The orders appointing the Fidelity Trust and Safety Vault Company receiver being simply nullities, that company is not an officer of the State court, and enjoining it in no way enjoins a proceeding in the State tribunal. This being so, the facts stated in the bill of complaint seem to present sufficient grounds for the temporary injunction prayed for against the defendant, The Fidelity Trust and Safety Vault Co., and also against the defendant Phelps, except that he should be left at full liberty to collect his judgment by all lawful means other than by subjecting thereto the mortuary calls, assessments, premiums and dues accruing upon the certificates or policies of members of the complainant association, to which, as we have seen, he has as yet manifested no right.

This court could not enjoin the execution of any of the writs for enforcing the judgment, and it might be the same if the insured in this case had, before complainant's bill was filed, brought an action in equity under section 439 of the Civil Code to enforce his judgment. The Kentucky Code of Practice, section 5, prescribed two separate kinds of actions. One of these is an ordinary action at law; the other an equitable action. In Davidson *vs.* Simmons, 11 Bush, 333, the court of appeals of Kentucky held that the action in equity provided for in that section (then section 474) was the only action allowed by the laws of Kentucky to enforce a judgment at law. That remedy by suit is exclusive. The amended and supplemental petition in the State court in this instance, even though transferred from the law docket to the equity docket was in no sense a suit in equity, nor for the reasons already given can it be regarded as a legal proceeding at all. It can only be considered as a vain thing. Of course, the State might have authorized such steps as those last taken in its court, but it has not done so in its Code of Practice or otherwise as the cited authorities demonstrate.

The holders of certificates in the complainant association in Kentucky appear to be numerous, and a mortuary call has been made which is due in a few days. Their payment to any person except the association may result in the lapse of many certificates and in irreparable injury to many members unless they pay both to the re-

ceiver and to the association. Much confusion is inevitable.
53 A multiplicity of suits seems unavoidable and the business of the complainant may be most seriously affected by what we have seen are wholly maintainable proceedings. Besides it has the right to protect that trust fund. We have also seen that those mortuary calls cannot properly be the subject of any form of garnishment.

Manifestly there is no adequate remedy at law for this state of things, and an injunction *pendente lite* is granted as prayed in the bill, with the modification indicated as to defendant Phelps.

Aug. 25, 1900.

WALTER EVANS, *Judge.*

In the Circuit Court of the United States for the Sixth Circuit.

MUTUAL RESERVE FUND LIFE ASSOCIATION, Plaintiff,
vs.
FIDELITY TRUST & SAFETY VAULT CO., &c., Defendants.

Demurrer for Lack of Jurisdiction and Equity.

Come the defendants, Fidelity Trust & Safety Vault Co., receiver of the Mutual Reserve Fund Life Association of Kentucky, for the special purpose and no other, until the question herein raised is decided of objecting to the jurisdiction of this court, by protestation, not confessing or acknowledging all or any part of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, demurs to the said bill and for cause of demurrer shows: First, that it appears by the plaintiff's own showing by the said bill that it is not entitled to the relief prayed by said bill against this defendant.

Second. That it appears from said bill of complaint of the plaintiff that this court has no jurisdiction to hear and determine this action; (*a*) the amount involved in this controversy is $1994.50, with interest, which amount is not sufficient to give this court jurisdiction of this cause; (*b*) this court is denied jurisdiction herein and precluded from a hearing of this action by reason of section 720 of the Revised Statutes of the United States.

Third. That said bill of complaint of the plaintiff is wholly without equity.

54 Wherefore, and for divers other good causes of demurrer appearing on said bill, this defendant demurs thereto, and it prays a judgment of this honorable court whether it shall be compelled to make further or any answer to the said bill; and it humbly prays to be hence dismissed with its reasonable costs in its behalf sustained.

ZACK PHELPS AND
B. F. WASHER,
Att'ys for Fidelity Trust & Safety Vault Co., &c.

DISTRICT OF KENTUCKY, *County of Jefferson,* } ss:

John Stites makes solemn oath and says that he is president of the above-named defendant, Fidelity Trust & Safety Vault Co., and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

JOHN STITES.

Subscribed and sworn to before me this 25th day of Aug. 1900. My commission expires 12th day of January, 1902.

FREDERICK FORCHT, JR.,
Notary Public, Jefferson Co., Ky.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

——— ———,
Of Counsel for Defendant.

Filed Aug. 25, 1900.

THOS. SPEED, *Clerk.*

And on another day of said term of said court, to wit, on the 2nd day of February, A. D. 1901, came the complainant by Pirtle & Trabue, counsel; came also the defendants, by Zack Phelps and B. F. Washer, their counsel, and moved the court to dissolve the injunction heretofore issued in this cause, upon written grounds, which are filed.

This action coming on to be heard, on the motion of the defendants to dissolve the preliminary injunction issued herein, and the motion having been submitted and duly considered, and the court being advised, it is now ordered that the said motion be and the same is hereby overruled at the defendants' cost.

55 From the foregoing decree, defendants pray an appeal to the United States circuit court of appeals for the sixth circuit, which is hereby granted, upon the defendants' execution of a bond as required by law in the sum of $250.00. Thereupon came defendants and tendered said bond, with Zack Phelps as surety, which bond is approved.

The grounds to dissolve injunction, above referred to, are as follows:

United States Circuit Court for the Sixth Circuit, District of Kentucky.

MUTUAL RESERVE FUND LIFE ASSOCIATION, Complainant,
vs.
JAMES S. PHELPS and FIDELITY TRUST & SAFETY VAULT CO., Receiver, etc., Defendants.

The defendants, James S. Phelps and The Fidelity Trust & Safety Vault Company, receiver, etc., now come and by their counsel, Zack Phelps and Benjamin F. Washer, *and* move the court to dissolve

the injunction heretofore issued in this case. In support of and as grounds for said motion, the defendants as aforesaid would represent:

(1.) That this court had no power, right, authority or jurisdiction to issue the injuction hereinbefore referred to. Said injunction has been granted to stay proceedings now pending in the law & equity division of the Jefferson circuit court, a court of competent jurisdiction of the State of Kentucky. Section 720 of the Revised Statutes of the United States provides that "a writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The injunction aforesaid has not been authorized by any law relating to proceedings in bankruptcy, and this court is therefore prohibited by the provision of the Revised Statutes just quoted from issuing or promulgating the order of injunction as mentioned.

(2.) This court is without power, right, authority or juris-
56 diction to issue the injunction aforesaid, because this suit does not involve matters exceeding the sum or value of two thousand dollars, exclusive of interest and costs. The matter here in dispute involves only the sum of one thousand nine hundred and ninety-four dollars and sixty cents, with interest, and such a sum is not sufficient to vest this court with jurisdiction to hear or determine the controversy attempted to be alleged in complainant's bill.

ZACK PHELPS,
BENJAMIN F. WASHER,
Att'ys for Defendants.

The petition for appeal, above referred to, is as follows:

United States Circuit Court for the Sixth Circuit, District of Kentucky.

MUTUAL RESERVE FUND LIFE ASSOCIATION, Complainant,
vs.
JAMES S. PHELPS and FIDELITY TRUST & SAFETY VAULT CO., Receiver, etc., Defendants.

Petition for Appeal.

The defendants, James S. Phelps and the Fidelity Trust and Safety Vault Company, receiver, etc., jointly and separately conceiving themselves aggrieved by the order refusing the defendants' application to dissolve the preliminary injunction herein issued, appeal from said order to the United States circuit court of appeals for the sixth circuit. Defendants file herewith, as reasons and grounds, their assignment of errors and pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States circuit court of appeals for the sixth circuit.

The order refusing to dissolve said preliminary injunction as

aforesaid is of date February 2nd, 1901, and is a part of the record herein.

ZACK PHELPS,
BENJAMIN F. WASHER,
Counsel for Defendants.

57 The assignment of errors, above referred to, is as follows:

United States Circuit Court for the Sixth Circuit, District of Kentucky.

MUTUAL RESERVE FUND LIFE ASSOCIATION, Complainant,
vs.
JAMES S. PHELPS and FIDELITY TRUST & SAFETY VAULT CO., Receiver, etc., Defendants.

Assignment of Errors.

The defendants, James S. Phelps and The Fidelity Trust and Safety Vault Company, receiver, etc., come and by their counsel, Zack Phelps and Benjamin F. Washer, *and* represent that the order of this court entered herein on February 2nd, 1901, refusing the application of the defendants to dissolve the preliminary injunction, hereinbefore issued, is erroneous and against the just rights of the defendants, for the following reasons:

(1.) That this court had no right, power, authority or jurisdiction to issue the injunction hereinbefore referred to. Said injunction has been granted to stay proceedings now pending in the law & equity division of the Jefferson circuit court, a court of competent jurisdiction of the State of Kentucky. Section 720 of the Revised Statutes of the United States provides that "a writ of injunction shall not be granted by any court of the United States where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The injunction aforesaid has not been authorized by any law relating to proceedings in bankruptcy, and this court is therefore prohibited by the provision of the Revised Statutes just quoted from issuing or promulgating the order of injunction as mentioned.

(2.) This court is without right, power, authority or jurisdiction to issue the injunction aforesaid, because this suit does not involve matters exceeding the sum of two thousand dollars, exclusive of interest and costs. The matter here in dispute involves only the sum of one thousand nine hundred and ninety-four dollars and sixty cents, with interest, and such sum is not sufficient to vest this court with jurisdiction to hear or determine the controversy attempted to be alleged in complainant's bill.

58 Wherefore said defendants pray that the order and action of this court as aforesaid be reversed and that the said court may be directed and required to sustain the motion of defendants to dissolve said preliminary injunction issued herein, as of right said motion should be sustained.

ZACH PHELPS,
BENJAMIN F. WASHER,
Counsel for Defendants.

The appeal bond above referred to is as follows:

Circuit Court of the United States, District of Kentucky.

MUTUAL RESERVE FUND LIFE ASSOCIATION
vs.
JAMES S. PHELPS ET AL.

Know all men by these presents, that we, James S. Phelps, and the Fidelity Trust and Safety Vault Company, and Zack Phelps, are held and firmly bound unto the Mutual Reserve Fund Life Association in the sum of two hundred and fifty dollars, to be paid to the said Mutual Reserve Fund Life Association, executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 2nd day of February, A. D. 1901.

Whereas, the above-named James S. Phelps, and the Fidelity Trust and Safety Vault Company, *hath* prosecuted an appeal to the United States circuit court of appeals for the sixth circuit, to reverse the decree rendered in the above-entitled suit, by the circuit court of the United States for the district of Kentucky, at Louisville.

Now, therefore, the condition of this obligation is such that if the above-named James S. Phelps and the Fidelity Trust and Safety Vault Company shall prosecute their said appeal to effect, and answer all costs, if they shall fail to make good their plea,
59 then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JAMES S. PHELPS, [L. S.]
By BENJ. F. WASHER, *Att'y.*
FIDELITY TRUST & SAFETY VAULT CO., [L. S.]
By BENJ. F. WASHER, *Att'y.*
ZACK PHELPS. [L. S.]

Sealed and delivered in the presence of
HENRY F. CASSIN,
Deputy Clerk, U. S. Courts.

United States Circuit Court, Sixth Circuit, District of Kentucky.

MUTUAL RESERVE FUND LIFE ASSOCIATION, Complainant,
vs.
JAMES S. PHELPS and FIDELITY TRUST & SAFETY VAULT COMPANY, Defendants.

Stipulation.

To shorten the record for appeal by eliminating unnecessary matter, it is stipulated:

1. That the clerk omit, in copying the record, the exhibits filed with the affidavit of Charles K. Lehrberg, August 25th, 1900, such

exhibits consisting of notice of mortuary call No. 111 and sample copies of the certificates of membership issued by complainant and referred to in the affidavit.

2. The following parts of the transcript of proceedings, in the State's court, filed with the bill of complaint as an exhibit therewith, viz:

a. Copy of the certificates of membership of the defendant in this suit, plaintiff in the suit in the State court, James S. Phelps.

2. Account, filed by said Phelps with his petition in the State court, of the dues and other sums paid by him as alleged in his petition.

c. The receipt of the association to Phelps for $84.60, countersigned November 1st, and receipt for $70.95, said receipts being identical in form with the receipt remaining in the record.

d. Notary's jurat to affidavit of Chas. W. Camp.

60 *e.* Collection list filed therewith (p. 4).

f. Certificates of John H. Page, clerk of the State court, to transcripts, it being admitted that the transcripts were duly certified.

g. Petition of Attilla Cox, to State court for advice.

PIRTLE & TRABUE,
For Complainant.
ZACK PHELPS,
BENJ. F. WASHER,
For Defendants.

Filed February 13, 1901.

DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the United States circuit court for the district of Kentucky, at Louisville, do hereby certify that the foregoing 68 pages contain a true and correct transcript of the record and proceedings in the case of Mutual Reserve Fund Life Association *vs.* James S. Phelps *et al.*, No. 6821, according to the stipulation of counsel filed herein, as appears from the files and records in my said office.

Witness my hand and seal of said court, this — day of February, 1901.

[SEAL.]

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN, *D. C.*

61 And afterwards to wit on March 2nd 1901, præcipe for appearance of counsel was filed clothed in the words and figures as follows:

62 United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1900.

JAMES S. PHELPS ET AL.
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION. } No. 955.

To the clerk of said court:

Please enter *my* appearance as counsel for the appellants.

ZACK PHELPS.
BENJAMIN F. WASHER.

☞ NOTE.—Must be signed by a member of the bar of Supreme Court of the United States or of any circuit court of the United States, and by individual (not firm) name.

[Endorsed:] No. 955. United States circuit court of appeals for the sixth circuit. October term, 189–. Appearance. Filed March 2, 1901. Frank O. Loveland, clerk of U. S. circuit court of appeals for the sixth circuit.

63 And afterwards to wit on October 23rd 1901 an entry was made upon the journal of said court in said cause which reads and is follows:

United States Circuit Court of Appeals for the Sixth Circuit.

JAMES S. PHELPS ET AL.
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION. } Before Lurton, Day, and Severens, JJ.

This cause is argued for appellants by Mr. Benj. F. Washer and for appellee by Mr. E. F. Trabue and is submitted.

And afterwards to wit on December 3rd 1901, a decree was entered in said cause which is in the words and figures as follows:

Decree.

64 United States Circuit Court of Appeals for the Sixth Circuit.

JAMES S. PHELPS and THE FIDELITY TRUST & SAFETY VAULT CO.
v.
MUTUAL RESERVE FUND LIFE ASSOCIATION. } No. 955.

Appeal from the circuit court of the United States for the district of Kentucky.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and

decreed by this court, that the decree of the said circuit court, in this cause be and the same is hereby reversed with costs and the cause is remanded to the said circuit court with directions to dissolve the injunction.

65 And afterwards to wit on December 24th 1901, an opinion was filed in said cause clothed in the words and figures as follows:

Opinion.

66 United States Circuit Court of Appeals, Sixth Circuit.

JAMES S. PHELPS ET AL., Appellants,
vs.
MUTUAL RESERVE FUND LIFE ASS'N, Appellee. } No. 955.

Appeal from the circuit court of the United States for the district of Kentucky.

Submitted Oct. 23, 1901; decided Dec. 3, 1901.

Before Lurton, Day, and Severens, circuit judges.

This is an appeal from a decree continuing an interlocutory injunction. The case is briefly this:

The appellee, The Mutual Reserve Fund Life Association, is a corporation organized under the laws of the State of New York. For many years it solicited insurance in the State of Kentucky, having complied with the law of that State in respect of the conditions upon which foreign insurance companies are permitted to do business in the State. As preliminary to being licensed its board of directors passed a resolution consenting that service of process in suits brought against it in Kentucky might be made upon the insurance commissioner of the State, and that such service should be a valid service upon the association.

October 10, 1899, the Kentucky insurance commissioner revoked all authority theretofore granted by his department, and all licenses granted to its agents to do business within the State. In this situation of things, suit was brought against the association, in the Jefferson circuit court, one of the courts of the State of Kentucky, having both common-law and equity jurisdiction, by James S. Phelps, one of the appellants. Phelps had, for many years, been a member of the association, and held a policy of life insurance therein.

67 He claimed that the company had, without his consent, violated the terms and conditions of its contract with him, and, in effect, had annulled and canceled its agreement with him, by the imposition of new and illegal arbitrary conditions. He, therefore, sued to recover back the dues, premiums and assessments paid by him theretofore, aggregating $1,994.20.

Process issued against the said association, which was returned served upon the insurance commissioner of the State of Kentucky, and upon one Ben Frese, who was described in the return as "the

managing agent and chief officer and agent of the Mutual Reserve Fund Life Association found in this county."

The association appeared specially and solely for the purpose of challenging the sufficiency of this service of the writ of summons, and moved to quash the return. Upon this motion, evidence was heard, involving the character of the agency of B. Frese, as well as the sufficiency of the service upon the State insurance commissioner after revocation of the company's license to do business within the State. Upon the evidence and exhibits, the circuit judge made a finding of fact and law which was in substance; first, that the resolution of the board of directors of the association, consenting that service upon the Kentucky insurance commissioner of process issuing in any suit pending, or which might be brought in the courts of the State, should be a valid service, had never been revoked or canceled and that the service of process in this suit upon the said commissioner was a good and valid service; second, that Ben Frese, at the time of service upon him, "was the local treasurer of the defendant association in Jefferson county, and, as such, was an agent of the company upon whom summons might be served."

The motion to quash was accordingly overruled. The defendant declined to plead further, and judgment by default was rendered for the sum of $1,994, with interest on the various items from date of each payment, respectively. This judgment for the principal sum and interest aggregated $2,360. Execution issued which was returned "no property found." Thereupon, the plaintiff in the said judgment, by leave of court, filed in the said Jefferson circuit court, and in the same case, a pleading, styled an "amended and supplemental petition." In this he set out the fact of his said judgment, and that execution had been duly returned "no property found," and that his said judgment was wholly unpaid. It was then in substance averred:

That the said association, at the time its license to do busi-
68 ness in the State had been withdrawn, had a great number of policy-holders in the State, which policies were a large source of income to the association, and that it had continued to do business within the State by collecting dues, premiums and assessments upon its said existing contracts, and that at stated times dues, premiums and assessments became due from said Kentucky policy-holders, which the company regularly demanded and received, as a condition of keeping in force its said contracts.

It was also averred that prior to December, 1899, such policy-holders had paid all dues, premiums and assessments to local collectors and treasurers, who were appointed at different places within the State for the purpose of receiving such dues, premiums and assessments accruing to the association, but that since December, 1899, the authority of all such collectors and treasurers had been revoked, and the company's debtors and policy-holders notified and required to forward all such dues, premiums and assessments directly to the home office of the association, in New York. This method of doing business, the petition averred, was adopted for the purpose of evading the service of process within the State, while so still carrying

on business in the State, and for the fraudulent purpose of removing its assets out of the State to evade the process of the law, and the payment of local creditors, and particularly with the intent of preventing this plaintiff in the collection and realization of the amount due upon his said judgment. The prayer of the petition was in these words:

"Wherefore, the plaintiff prays for a decree in aid of and in the enforcement of the judgment heretofore rendered in this court, and to this end plaintiff prays that a general attachment issue against the property of the defendant, The Mutual Reserve Fund Life Association; that the defendant and all persons now or heretofore connected with said defendant be required to appear before the commissioner of this court, and disclose any money, choses in action, equitable or legal interest, and all other property to which the defendant is entitled *to* or *to* which he has an interest; or if it seems best to the court, the plaintiff prays that a receiver be appointed to take charge of the business, assets and all other property of every kind and description which the defendant has in Kentucky or may hereafter obtain in this State, that all revenues and incomes accruing to the defendant from policy-holders and other debtors be ordered paid to said receiver; and that so much as may be necessary of any money or property belonging to the defendant as may, by any order or process, come within the jurisdiction of this
69 court be employed to the settlement and satisfaction of the judgment which the plaintiff holds against the defendant, as set forth and mentioned herein. Plaintiff prays for his costs in this action, and for all other relief, general, equitable and special."

The final judgment in favor of said James S. Phelps was rendered May 19, 1900. This amended or supplemental petition was filed August 4, 1900, and on the same day the said Jefferson circuit court made an order, entitled as in the original suit, directing that the petition be filed and the action transferred to the equity docket. By the same order the court appointed the appellee, The Fidelity Trust and Safety Vault Company, receiver for the Mutual Reserve Fund Life Association in Kentucky, and directed it to "collect and receive all moneys, debts, things in action and credits now owing to or hereafter to accrue to the said Mutual Reserve Fund Life Association in Kentucky. * * *" That the said receivers "shall take into possession all the revenue and income which has accrued or may accrue to the defendant from its business in this State and policy-holders." It was further ordered that, "all persons insured in said association and all other debtors of said association in Kentucky are now specifically ordered and directed to pay to the receiver herein appointed all dues, premiums, assessments and whatever else of value may now be or hereafter become owing or due to the said defendant association."

The receiver was authorized to employ counsel and to bring and defend all suits necessary to recover the assets of the association and all persons were enjoined from interfering with him in the custody, management and control of the assets and rights "hereby impounded and placed in the hands of said receiver," who was directed

to hold the same for the satisfaction of the judgment of said petitioner, Phelps, and of the costs and expenses of the receivership.

It was directed that "when such judgment shall be paid and such costs and expenses liquidated, the receivership provided for herein shall terminate." The receiver was further directed to make report from time to time of all his acts and proceedings. The receiver qualified on the same day, by giving the bond required by the court.

On August 22d, following, the said Mutual Reserve Fund Life Association, appearing for the sole purpose of filing a petition for the removal of said action, did file a petition praying the removal of said proceeding which was described "as an equitable action ap-
70 parently based or sought to be maintained upon the statutory authority of section 439 of the Code of Practice in Civil Cases, based upon a return" of *null bona*, etc. * * * It was averred that the amount in controversy exceeded $2,000, being $2,360, with interest from May 18, 1900. That the petitioner was a corporation of the State of New York, and that the plaintiff in said proceedings was a citizen and inhabitant of the State of Kentucky. Bond, conditioned as required by law, was tendered. The application to remove was denied.

Thereupon, the said Mutual Reserve Fund Life Association, for brevity, hereafter called the "association," filed the present bill in the circuit court below, the said James S. Phelps, plaintiff in said judgment, and The Fidelity Trust and Safety Vault Company, a corporation of the State of Kentucky, being sole defendants.

The averments of this bill were substantially the facts already stated, and need not be repeated. A duly certified transcript of all the proceedings in the Jefferson circuit court was made an exhibit to said bill. It was further averred that said receiver so appointed had caused to be issued to all of the holders of policies residing in Kentucky, notice of his appointment and of the order of the court requiring all dues, premiums and assessments to be paid to him and warning them that payments thereafter to the association would be ineffectual in respect to dues then or thereafter accruing. The judgment in favor of Phelps was asserted as null and void for want of due notice and service of valid process. It was further averred that no notice of any kind or character had been given of the filing of the "amended and supplemental petition,' under which a receiver had been appointed. This, it was averred, was a proceeding without due process of law, and in violation of the provisions of the fourteenth amendment.

The object of the bill is fully shown by its prayer, which was as follows:

"Your orator prays the aid of this honorable court, and that it may please your honors to grant unto your orator a writ of injunction commanding the said defendants, and each of them, and all persons claiming to act under their authority, or the authority, direction or control of either of them, to absolutely desist and refrain from taking possession of or in any wise interfering with any of the

assets or estate of your orator in the State of Kentucky, and from collecting or receiving any moneys, things in action, credits, income or revenues now owing to or hereafter to accrue to your orator, and especially the dues, premiums and assessments payable to your orator by its members by virtue of the terms of their certificates of membership, and from taking or instituting any action or other proceedings against said members, or any of them, to collect or realize such dues, premiums or assessments, or to prevent them, or any of them, from paying over to your orator, according to the stipulations and provisions of their certificates of membership, all dues, premiums and assessments payable according to the tenor thereof, until otherwise ordered by your honors; and that upon final hearing the injunction herein prayed be made perpetual."

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After notice and argument by counsel the court below granted an interlocutory injunction in these words:

"The defendants, James S. Phelps and The Fidelity Trust and Safety Vault Company, and all its officers and agents, are severally hereby enjoined and restrained from collecting or attempting to collect and from reducing or attempting to reduce to possession, and from in anywise interfering with or claiming any of the revenue or income of the complainant derived from any of the dues, assessments, mortuary calls or premiums which have accrued or which may accrue or be made upon any of the certificates of membership or policies of life insurance issued by complainant to any person or persons whatsoever, but the defendant, James S. Phelps, is left at full liberty to proceed otherwise to enforce against any other property or assets of the complainant any judgment he may have against the complainant by all lawful writs or processes as he may be advised."

A motion to discharge this injunction was subsequently made and overruled, and from this order continuing this injunction this appeal has been prayed.

LURTON, circuit judge, after making the foregoing statement of the case, delivered the opinion of the court:

1. The judgment in favor of appellant, James S. Phelps, and against the appellees, The Mutual Reserve Fund Life Association, has been assailed because it is said that the Jefferson county circuit court did not obtain jurisdiction by the service of process upon Ben Frese, as a local agent or by the service upon the Kentucky commissioner of insurance. But the association appeared in the Jefferson court for the very purpose of putting in issue the sufficiency of that service. The determination of the issue thus made up involved questions of law and fact. The judgment of the State court contains these recitations:

"This action having heretofore been submitted upon a motion to quash the service of process. Upon which motion the court made the following findings of law and facts which are incorporated in and made a part of this judgment, to wit:

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"First. Upon proof induced by affidavits the court was and is of the opinion that Ben Frese at the time of service of summons upon him in this action was the local treasurer of the defendant associa-

tion in Jefferson county, Kentucky, and as such was an agent of the company upon whom summons might be served, and the defendant association thereby brought before the court. By the summons herein upon the said Ben Frese, the defendant association was brought before this court in this action, and the jurisdiction of this court to grant the relief prayed for in the petition became vested.

"Second. It appearing from proof induced by affidavits that the defendant association did, by resolution of its board of directors adopted prior to the service of summons in this action, consent that service of process upon commissioner of insurance of this State in any action, brought or pending in this State, should and shall be a valid service upon said defendant association, and it further appearing to the court that the authority and power to receive service of process thus vested in the commissioner of insurance of Kentucky has never been revoked, canceled or annulled, this court held and now holds that the summons served upon the commissioner of insurance of Kentucky, in this action was a valid and sufficient service, and operated to bring the defendant association before the court, and subject said defendant association to the jurisdiction and decrees of this court in this action.

"This action having now been regularly set at rules and called by the court and the necessary time for answer having elapsed without any action being taken by the defendant, the cause was regularly submitted for judgment. The court being advised by the uncontroverted allegations of the petition, that the prayer of said petition should be granted, it is, therefore, ordered and adjudged that the plaintiff recover of the defendant the sum of nineteen hundred and ninety-four ($1,994) dollars, with interest on the various amounts going to make up said sum from the dates of the payments of such various amounts to the defendant association, as shown by the itemized statement and account filed with the petition; amounting in all to twenty-three hundred and sixty ($2,360) dollars, with interest from this date, May 19, 1900, and that plaintiff further recover of defendant his costs in this action expended, for all of which debt, interest and costs the plaintiff may have immediate execution."

Having appeared for the purpose of challenging the jurisdiction of the court, the decision of the court upon that issue is conclusive, until annulled or reversed by some court having jurisdiction to revise and correct error.

However erroneous the conclusions of the Jefferson circuit
73 court may have been, and we intimate nothing in that respect, its judgment is certainly not void, and in a proceeding of this kind we must accept it as a valid and legal judgment, for neither the circuit court nor this court have any character of appellate or revisory jurisdiction over that court. The question is not one of waiver of personal jurisdiction by an appearance solely for the purpose of contesting that jurisdiction, but of the effect and force, in a collateral attack, of a judgment upon an issue involving the jurisdiction of the court over the person of a defendant, to which issue the

present appellant was a party. The court below was, therefore, right in assuming the validity of the judgment which was the foundation for the subsequent proceedings which led to the injunction here involved.

2. We are unable to agree with the opinion of the court below that the jurisdiction of the State circuit court was exhausted by the rendition of its judgment. The power to render that judgment included the power to issue all proper process to enforce its payment. The jurisdiction of the court over the controversy and over the parties acquired in the primary case by service of process continued until its judgment should be satisfied. This is a well-settled rule in respect to the jurisdiction of courts of record. Wayman *v.* Southard, 10 Wheaton, 1, 22; Riggs *v.* Johnson County, 6 Wall. 166, 187, 197; Covell *v.* Heyman, 111 U. S. 176, 183; Rio Grande R'd *v.* Gomila, 132 U. S. 483, 478.

Riggs *v.* Johnson County, cited above, is much in point. In that case a judgment had been rendered against Johnson county upon bonds. An execution was returned unsatisfied. The plaintiff then applied for a writ of mandamus to compel the levy of a tax under a law in force when the bonds were issued. The officials against whom the writ was directed replied that prior to the application for the writ of mandamus they had been enjoined by a State court from making any levy. This raised a question as to which of the two courts should be obeyed and the decision was made to turn upon priority of jurisdiction over the controvery. In respect to the power of the circuit court to issue a writ of mandamus after judgment and in aid of its enforcement, the court said:

"Jurisdiction is defined to be the power to hear and determine the subject-matter in controversy in the suit before the court, and the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree.

"Express determination of this court is, that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. Consequently, a writ of error will lie when a party is aggrieved in the foundation, proceedings, judgment, or execution of a suit in a court of record.

"Process subsequent to judgment is as essential to jurisdic-
74 tion as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution."

In answer to the argument that the State court had first obtained possession of the controversy by issuing its injunction before application made from the writ of mandamus, the court said:

"Unless it be held that the application of the plaintiff for the writ is a new suit, it is quite clear the proposition is wholly untenable. Theory of the plaintiff is, that the writ of mandamus, in a case like the present, is a writ in aid of jurisdiction which has previously attached, and that, in such cases, it is a process ancillary to the judgment, and is the proper substitute for the ordinary process of execution, to enforce the payment of the same, as provided in the

contract. Grant that such is the nature and character of the writ, as applied in such a case, and it is clear that the proposition of the defendant must utterly fail, as in that view there can be no conflict of jurisdiction, because it has already appeared that a State court cannot enjoin the process or proceedings of a circuit court.

"Complete jurisdiction of the case, which resulted in the judgment, is conceded; and if it be true that the writ of mandamus is a remedy ancillary to the judgment, and is the proper process to enforce the payment of the same, then there is an end of the argument, as it cannot be contended that a State court can enjoin any such process of a Federal court."

In conclusion, the court held that the circuit court had not lost jurisdiction by the rendition of the primary judgment, and that the writ of mandamus was a writ ancillary to the judgment, and not a new suit, but proper process to enforce satisfaction of its primary judgment.

In the instance before us, the State court had acquired jurisdiction over the association, by service of process upon its duly constituted agents. An execution had been returned no property found. The court by a sworn petition was then advised that this non-resident judgment debtor had no property subject to execution, but that it was in receipt at stated times of dues and premiums upon existing contracts of insurance, and that it had revoked the authority of all of its agents and collectors within the State, and was requiring all such accruing dues to be remitted directly to its home office by the policyholders themselves, and that this method of conducting its business in the State had been resorted to for the purpose of removing its assets beyond the jurisdiction of the State. In this situation, the court was asked to impound and sequester these choses in
75 action, through means of a receiver, that they might be applied to the payment of this judgment.

Manifestly, the action of the court in impounding property of the judgment debtor, which could not be reached by execution, was action auxiliary to the primary suit. The proceeding was not in any sense a new suit or a separate action. That which the court was asked to do, and that which the court did do, was to take a step in aid of the satisfaction of its judgment, and this it did as a proceeding ancillary to the judgment, and by virtue of its previously acquired jurisdiction over the subject-matter of the controversy and of the parties.

Instead of ordering an alias fi. fa., or an attachment, it appointed *it* a receiver, and directed him to take possession of the choses in action which apparently constituted the only property of the debtor within the jurisdiction. This appointment was made without other than constructive notice. How, otherwise, could it be if the averments of the supplemental petition were true? Was the court powerless because the judgment debtor was a foreign corporation, unrepresented by agents and having no property subject to execution?

As we are advised by an opinion subsequently filed by the very learned judge of the State court, that court regarded a summons

upon this supplemental proceeding as wholly unnecessary, because no new cause of action was presented therein and because the judgment debtor was charged with constructive notice of all steps taken in the case, after the original service in the primary action. Aside from any question of the sufficiency of constructive notice where, in the same case, a receiver is applied for, after judgment, and a return of *nulla bona*, as a substitute for an alias execution, or an attachment, or other proper writ of process, we are not prepared to say that if such a supplemental matter be regarded as a new suit or action that the constitutional requirement of due process is infringed if a receiver be appointed before notice. Doubtless the general rule is, that, even after judgment, application for appointment of a receiver should not be entertained without notice. Beach Equity Practice, section 730, and cases cited.

"But, says the author, "the rule requiring notice is not so inflexible as to prevent the court from proceeding in cases where it is impracticable to give legal notice, as in the case of absconding or nonresident defendants, or in case of great emergency demanding the immediate interference of the court."

The ground upon which the court below proceeded was that
76 there was no such vitality remaining in the primary suit as to justify any kind of supplementary proceeding. To quote the figurative, yet forceable, language of Judge Evans, "The whole so-called supplemental proceeding was an attempt to graft a living branch upon a dead stalk." For this reason, said the judge, "the filing of the supplemental petition and the action of the court appointing a receiver thereupon will be treated as nullities." The metaphor as we have already seen is not apt. The jurisdiction of the State court had not been exhausted by the rendition of its judgment, for under well-settled rules of general jurisprudence, it continued for the purpose of enforcing satisfaction of that judgment.

We have not been cited to any decisions of the highest court of Kentucky, nor to any statutory provision which conflicts with the view which Judge Toney, of the Jefferson circuit court, took as to the ancillary powers of his court. Counsel for appellees have cited two decisions as supporting the view of the court below. They are Brown *v.* Van Cleave, 86 Ky. 381, and Meadows *v.* Goff, 90 Ky. 540. Brown *v.* Van Cleave was a proceeding by attachment against a nonresident copartnership, of which it was averred Brown was a member. The property attached was shares of stock belonging to Brown. Brown appeared and denied that he was a member of the firm which had made the notes in suit. This issue was found in Brown's favor. But the court held him liable for a part of the debt in suit, because incurred at a time when he was a member of the firm sued. Judgment went against Brown accordingly. It was further ordered that unless he paid into court, within ten days, an amount sufficient to pay this judgment and costs the attached shares should be sold. Brown complied and paid in the sum necessary to satisfy the judgment against him.

On the day he did this, the plaintiff filed an amended pleading in which he sought to subject Brown's attached shares to the satis-

faction of that part of the debt in suit for which Brown had been held not liable upon the ground that Brown had permitted the firm of which he was not a member to pledge the attached shares for the payment of the firm's debts. The object was to tack this new cause of action on to the old suit, already decided, and thus hold on to the attached property. The Kentucky court of appeals held that this could not be done, as the rights of the parties had been litigated to a final judgment. The court, among other things said:

"After a final judgment had been reached, and after it had been
77 discharged according to the term prescribed by the court, the appellee filed an amended petition, in which he set up a new and distinct cause of action against the appellant. The cause of action thus set up was not designed to aid in effectuating the judgment already rendered, for that judgment had been satisfied; but it was designed to subject the appellant's property to the payment of the remaining portion of the two notes, for the payment of which he, according to the judgment of the court, was not bound."

"It is thus seen that the amendment proposed a new and distinct cause of action and for that reason alone the amendment should have been rejected."

Meadows *v.* Goff is to the same effect. After a judgment in an action of ejectment, a stranger asked leave to appear and be made a party defendant, upon the ground that the land belonged to her and not her husband, who had been sole defendant. The court held she came too late.

We see nothing in either of these cases which militates against the procedure of the State court in the proceedings instituted there in aid of the satisfaction of its judgment. The label affixed to the petition praying an attachment or the appointment of a receiver is of no conclusive significance. The relief sought should determine its nature. It was not thereby sought to amend the original petition nor to tack on to the original cause of action a new and distinct suit, as in Brown *v.* Van Cleave, cited above. The relief was plainly in aid of the judgment already rendered, differing in kind only from an alias execution, a writ of attachment, or a writ of mandamus. A receiver was sought as a means of impounding property of the judgment debtor and applying it to the satisfaction of the judgment rendered. The appointment of a receiver was neither more or less than the seizure of the judgment debtor's property for the satisfaction of the judgment of the court by an equitable attachment.

Aside from the general equity powers of the Jefferson circuit court, under which a receiver might be appointed under circumstances authorizing such action by a court proceeding according to the usual course of a court of equity, there was a statute which expressly granted power to appoint a receiver "on motion of any party to an action" who brings himself within the terms of that law. Section 298, Ky. Codes, Revised, Carroll, 1900, reads as follows:

"On the motion of any party to an action who shows that he has, or probably has, a right to, a lien upon, or an interest in, any property or fund, the right to which is involved in the action, and
78 that the property or fund is in danger of being lost, removed or materially injured, the court, or the judge thereof, during

vacation, may appoint a receiver to take charge of the property or fund during the pendency of the action, and may order and coerce the delivery of it to him. The order of a court, or of the judge thereof, appointing or refusing to appoint a receiver, shall be deemed a final order for the purpose of an appeal to the court of appeals. Provided, that such order shall not be superseded."

Sections 439 and 441, of the same Code, read as follows:

"After an execution of *fieri facias*, directed to the county in which the judgment was rendered, or to the county of the defendant's residence, is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the same, the plaintiff in the execution may institute an equitable action for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the judgment; and, in such actions, persons indebted to the defendant, or holding money or property in which he has an interest, or holding evidences or securities for the same, may be also made defendants."

"In such action the plaintiff may have an attachment against the property of the defendant in the execution, similar to the general attachments provided for in chapter three, of title eight, without either the affidavit or bond therein required."

Having, as we conclude, already acquired jurisdiction over the defendant, by service duly served in the original suit, the ruling of the learned judge of the State court was, in effect, that the law of Kentucky did not require that a new subpœna should issue before he could, in aid of the enforcement of the judgment rendered, act upon an application for a receiver, and that the defendant, being already before the court, under primary process, no further notice was necessary as a condition to the seizure of its property to compel satisfaction of its judgment. It may be that in this ruling that court erred, but we are not content to so decide in the absence of some statute more explicitly requiring such new summons or other notice, or some decision of the supreme court of Kentucky in conflict with the decision as to the law of Kentucky made in the very case now under examination.

Whether the decision of Judge Toney was rested upon the general powers of a court of record, having general law and equity jurisdiction, or was based upon the interpretation of sections 298 or 439, it was the decision of a court whose jurisdiction had not been
79 exhausted by the rendition of its judgment, but continued until it should be satisfied for the purpose of the issuance of all proper writs or process in aid of its enforcement. Having jurisdiction through the service of the primary summons, everything subsequently done within the general sphere of its power to compel the satisfaction of its judgment should be held as conclusive when collaterally assailed in the courts of another jurisdiction unless it is impeached for fraud. If the court erred in its construction of the statute or in the exercise of its powers by appointing a receiver without notice, the remedy was by seasonable proceedings in error.

Cornett *v.* Williams, 20 Wall. 226, 250; Laing *v.* Rigney, 160 U. S. 531, 542.

In Elder *v.* Richmond Gold & Silver Mining Co., 58 F. R. the court of appeals for the eighth circuit, speaking by Circuit Judge Caldwell, said:

"The court had jurisdiction of the parties and the subject-matter, and it had the power, and it was its duty, to hear and decide every question of fact and law that arose in the progress of the case, until it was finally disposed of. It was its duty to inquire and decide whether the requirements of the practice act, in the particular mentioned, had been observed. The presumption is that it did inquire, and that it decided the question rightly, and this presumption is of conclusive force as against a collateral attack upon the judgment. But if this, or any other question of law or fact which arose in the progress of the case, was erroneously decided, the jurisdiction of the court, and the validity of its judgment, would not be affected thereby. An erroneous decision does not divest a court of its jurisdiction over the case. Elliott *v.* Piersol, 1 Pet. 328, 340. If it commits errors, they can only be corrected by appropriate appellate procedure in a court which, by law, can review the decision. Bronson *v.* Schulten, 104 U. S. 410. But neither this court nor the circuit court is invested with appellate or supervisory jurisdiction over the State courts, nor can either reverse, vacate or modify their judgment, in cases in which they had jurisdiction of the parties and the subject-matter. Randall *v.* Howard, 2 Black, 585; Nouge *v.* Clapp, 101 U. S. 551; Central Trust Co. *v.* St. Louis, A. & T. R'y Co., 40 F. R. 426. The judgment of June 10, 1882, even if it was erroneous, was not void, and has the same force and effect as if no error had been committed in its rendition."

3. But if we are in error in respect to the law of Kentucky, and that under the law of that State a new writ of summons should have issued as a prerequisite to jurisdiction under the proceedings supplementary to the primary judgment, we are then confronted with the grave question, as to whether, under section 720, Revised Statutes, the court below did not err in issuing the injunction against
80 the receiver of the State court. That section reads as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The position of the court below, and of the counsel for appellee here, is, that if the State court exceeded its jurisdiction, by assuming to appoint a receiver in aid of the enforcement of its own judgment without a new summons or notice, that the proceeding under which its jurisdiction in that respect was invoked is to be regarded as not being a "proceeding" within the meaning of section 720, and that a receiver appointed under such circumstances is not, in any sense, an officer of the State court, and that an injunction against such an interloper is "in no way enjoining a proceeding in a State court."

To so narrow a construction of the term "proceedings in any court of a State," we cannot assent, and no authority has been produced which sanctions any such definition. The supplemental petition filed in the primary suit was an appeal to the supposed power of the court to order any other or further writs or process necessary to compel payment of its judgment. The petition constituted a "proceeding" in court whether we regard it as a new action or as a mere collateral and supplemental pleading. In point of fact the "proceeding" was neither regarded by the State court or by the party filing it, as a new action, but as a collateral and supplemental appeal to the continuing jurisdiction of the court until its judgment should be satisfied; and if the action of the State court is subject to criticism, it is because when its jurisdiction was thus invoked it erred in assuming that it might act upon the constructive notice of the primary suit, and without a new writ of summons or other form of notice.

But, does it follow, because the State court exceeded its jurisdiction by thus appointing a receiver in aid of the enforcement of its own judgment without notice, that a court of the United States, upon the application of the judgment debtor, and in defiance of the injunction which forbid any interference with the receiver in the discharge of his duties, may enjoin that receiver from obeying the order of the court, whose officer he colorably was, or dispossess him from the custody of the property which he had been directed to hold?

There is no pretense of any prior suit involving the same con-
81 troversy in the United States court, nor of any prior possession, constructive or actual, of the *res* which the receiver was ordered to reduce to possession. The injunction of the State court, forbidding interference with its receiver, is met with a counter-injunction forbidding the receiver to proceed with the duties of his appointment and forbidding his interference with the property of the Mutual Reserve Fund Life Association, which the State court had specifically directed him to take possession and custody of. Which court shall the receiver obey? Unless one court or the other shall yield its pretensions nothing remains but an appeal to force. Fortunately, the State court, while justifying its action in an opinion of vigor but commendable courtesy, has directed its receiver to apply to the circuit court to discharge its injunction, and to appeal to this court from any order continuing it in operation.

If there are principles of comity, or of statutory construction, by which so deplorable a conflict between coequal courts of concurrent jurisdiction may be avoided, and the operations of our independent systems of judicature rendered harmonious, it is our highest duty to discover and apply them. "It forms a recognized portion of the duty of this court," said Justice Campbell, in Taylor *v.* Carryl, 20 How. 583, 595, in speaking for the court, "to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the State and the Union, so that they may co-operate as harmonious members of a judicial system, coextensive with the United States, and submitting to paramount authority of the same constitution, laws and Federal obligations." Continuing he said: "The decisions of this court that declare

such an aim, and that embody the principles and modes of administration to accomplish it, have gone from the court with authority, and have returned to it, bringing the vigor and strength that is always imparted to magistrates of whatever class, by the approbation and confidence of those submitted to their government."

It is a rule of almost universal application that between courts of the same sovereignty, and concurrent jurisdiction, the court which first acquires jurisdiction of the controversy, or of the *res*, should be suffered by every other court to decide every question within the sphere of the pending cause, and to continue in the possession of the subject-matter of the controversy until every question before it shall be decided, and the *res* discharged from its control.

82 This rule has its foundation, perhaps, in comity, but the fruits of its recognition have been so beneficent, when applied to courts of concurrent jurisdiction, created by different sovereignties, as to justify the conclusion that it is not only a rule of comity, but one of necessity. The cases are numerous which recognize its binding force and illustrate its wide application. No useful purpose will be subserved in making quotations from them. We content ourselves with the citation of a few which are most in point. Peck *v.* Jenness, 7 How. 612; Taylor *v.* Carryl, 20 How. 583; Ableman *v.* Booth, 21 How. 506; Freeman *v.* Howe, 24 How. 450; Tarbles case, 13 Wall. 397; Buck *v.* Colbath, 3 Wall, 334; Covell *v.* Heyman, 111 U. S. 176; Central Bank *v.* Stevens, 169 U. S. 432, 452; Riggs *v.* Johnson County, 6 Wall. 166; Moran *v.* Sturgis, 154 U. S. 256; Shields *v.* Coleman, 157 U. S. 168; American Association *v.* Hurst, 7 C. C. A. 598; Southern Bank *v.* Folsom, 21 C. C. A. 568; Mills *v.* Prov. Life Ins. Co., 100 F. R. 344; Aultman *v.* Brumfield, 102 F. R. 7; Senior *v.* Pierce, 31 F. R. 628; Har. Krader *v.* Wadley, 172 U. S. 148.

The courts of the State and of the United States are as to each other foreign courts. Nevertheless the power sometimes exercised by courts of equity to restrain parties within their jurisdiction from proceeding in a foreign court, does not apply to them, and it has long been recognized that State courts cannot enjoin proceedings in the courts of the United States, nor the latter in the former courts. Story Eq. Juris., sections 899, 900; Central Nat. Bank *v.* Stearns, 169 U. S. 436, 462, 463.

Section 720 originated in 1793, and is a legislative command affirmatively enforcing this rule of comity by expressly prohibiting the enjoining of proceedings in State courts, except when authorized in bankrupt cases. Some cases other than bankruptcy suits have been held not to be within the literalism of the statute. Thus, it has been held that the statute does not prevent a court of the United States from protecting its own prior jurisdiction over the property in controversy. Iron Mountain Railroad Co. *v.* City of Memphis, 37 C. C. A. 410. Nor from enforcing its own judgments in causes removed from the State court. French *v.* Hay, 22 Wall. 250; Dietzsch *v.* Huidekoper, 103 U. S. 494. So it has been held that when the requisite Federal jurisdiction exists, a bill in equity will lie to deprive parties of the benefits of a decree or judgment

obtained by fraud in a State court. Barrow *v.* Hutton, 99 U. S. 80; Arrowsmith *v.* Gleason, 129 U. S. 86, 101; Johnson *v.* Waters, 111 U. S. 640, 667.

83 In Marshall *v.* Holmes, 141 U. S. 589, 599, a bill to annul, on the ground of fraud, judgments rendered by a State court was upheld.

The court, among other things, saying:

"While it cannot require the State court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a State court. It would simply take from him the benefit of judgments obtained by fraud."

It is plain that in all these cases the Federal court was violating no rule of comity, for in every one of the supposed exceptions to the statute the court was either protecting its own prior possession of the *res*, or of the controversy, or enforcing it- own judgment. This is true of a suit for the nullification of a judgment upon the ground of fraud. The relief sought in such a case would be the subject of an independent suit in equity, and, if the requisite diversity of citizenship existed—such a suit could be maintained in a circuit court of the United States, and any injunction against the enforcement of the judgment nullified for fraud would be mere process for the enforcement of its own judgment and operative only through its jurisdiction over the parties thereto.

In passing, however, it may be observed that in none of the cases of this class reported, was any injunction actually granted in the Federal court. In Marshall *v.* Holmes, an injunction was allowed in the State court before removal. This remained in force, for the cause stands after removal just as it did before. Bondurant *v.* Watson, 103 U. S. 281, 287. None of these instances of so-called exceptions made by judicial constructions of the statute apply to the case in hand.

The effort to remove the proceeding under which the receiver was appointed was rightly denied, for, in any view we take of the matter, it must be regarded as a proceeding ancillary to the primary suit and not as an independent suit. Barrow *v.* Hunton, 99 U. S. 80, 85; Marshall *v.* Holmes, 141 U. S. 589, 597. Unless the court below can enjoin the proceeding in the State court and prevent the receiver thus appointed from executing the orders and directions of that court, it is plain that no equitable jurisdiction exists. But it is said that neither the statute nor any rule of comity requires the United

84 States courts to refuse a remedy by injunction against any proceeding under which property is about to be taken without due process of law.

The receiver was armed with the authority of the Jefferson circuit court. He was colorably, at least, its officer, and his action was its action, his possession its possession, though constructive and not

actual. It is not enough for one to say, "This process under which my property is about to be taken is issued without authority, or that the officer who assumes to exercise dominion over my property was appointed by a court which exceeded its jurisdiction in appointing and instructing him." The effect of the appointment of the appellant as receiver, under the terms of the order, already cited, was to place him constructively in possession of the property of the appellee association within the State of Kentucky. To obtain actual possession he had, when enjoined, notified the association debtors to pay their debts to him, and had thus done all that was possible, without instituting suit, to reduce these choses in action to his actual possession.

Is it possible that under such circumstances the receiver may be ousted from its constructive possession and the hand of the State court stayed, while the United States court determines the question, as to whether under the law of Kentucky the State court had the jurisdiction to make the order and take the step complained of? No case has been cited which gives support to this contention. It is not relevant to say that a void judgment is a nullity, and that whenever it is set up as a justification its voidness may be shown? Nor is it relevant to say that the jurisdiction of the court is always a subject of inquiry when a foreign judgment is sued upon.

The question we have to deal with involves no such question, but concerns the power of a United States circuit court in view of section 720, to enjoin a proceeding in a State court of concurrent jurisdiction for the purpose of determining whether or not it had exceeded its jurisdiction in respect to the matter complained of.

A receiver is peculiarly the hand of the court which appoints him. His possession, whether actual or constructive, is but the possession of the court, and when he is dispossessed or enjoined, the court is dispossessed or enjoined. Can it need anything more than the plain unmistakable language of the statute to perceive that such a case is within both its letter and spirit? Is it enough to take a given case out of the statute that the complainant asking an injunction against action under an order, a writ or process from a State court challenges the power of the court to make the order, or issue the writ complained of?

85 It will not do to say that the owner of property taken constructively or actually, or about to be so taken, by invalid order or process of a court of another jurisdiction, is otherwise without remedy. Such an owner may apply for relief to the court under whose authority his property has been seized. Freeman *v.* Howe, 24 How. 450; Covell *v.* Heyman, 111 U. S. 176; American Association *v.* Hurst, 16 U. S. App. 325; Gumbel *v.* Pitkin, 124 U. S. 131; Krippendorf *v.* Hyde, 110 U. S. 276; Lammon *v.* Feusier, 111 U. S. 17. If the officer taking the property exceeds the authority of his writ, he may be sued in any court having jurisdiction in an action of trespass. Buck *v.* Colbath, 3 Wall. 334.

A third remedy consists in the right to sue for the recovery of the property after the hand of the court seizing it has been raised. If the taking was under a proceeding void for want of due process of law, the title of one acquiring it under such an invalid proceeding

would be unavailing. Cooper *v.* Newell, 173 U. S. 555. To prevent such unnecessary conflicts of jurisdiction as that presented on this record, the statute, now section 720, Revised Statutes, was enacted. The burden is upon one who asserts an interpretation of that provision, which would tend to weaken its force and defeat its beneficent purposes. The spirit of the rule of comity between courts prevents interference, not upon any question of ultimate right or wrong, but upon the question as to which jurisdiction had first attached. This rule is clearly and definitely established. Taylor *v.* Carryl, 20 How. 583; Freeman *v.* Howe, 24 How. 450; Kripendorf *v.* Hyde, 110 U. S. 276; Southern Bank *v.* Folsom, 21 C. C. A. 563, and 75 F. R. 929. There may be instances in which the question as to which of two conflicting authorities should prevail, may turn upon priority of *actual* seizure and custody of the property in suit. But the cases in which a distinction between actual and constructive seizure and custody has been observed, have been cases in which the jurisdiction of the United States courts have been exclusive, and not concurrent with the State courts.

Thus, in Taylor *v.* Carryl, 20 How. 583, 601, the facts were that a vessel had been actually seized under an attachment issuing from a State court, and was under order of sale made by the State court—when process issued under a libel filed in the district court of the United States for mariners' wages and supplies. It was held that the libel did not divest the officials of the State court of their authority over the vessel, and that of the two sales made, one by the sheriff and one by the marshal, the sale by the sheriff conveyed the legal title, and the sale by the marshal was inoperative. The
86 decision was expressly put upon the single ground, that while the property levied upon was in the actual possession of one jurisdiction, it should not be taken by an officer acting under another. In Moran *v.* Sturgess, 154 U. S. 256, 276, *et seq.*, the facts were much the same with this distinction; the State court had not made any *actual seizure* of the vessels, though it had appointed a receiver who had not qualified when the vessels were seized by the marshal under libels filed subsequent to the proceedings for appointment of a receiver in the State court. The holding was, first, that the State court had no authority to enforce maritime liens; second, that being without power to enforce such liens it was incapable of displacing them; third, that for this reason actual possession by a State court of the *res* subject to such liens will not be disturbed, but as a State court can only deal with the property subject thereto, when its jurisdiction has determined the admiralty courts may proceed; fourth, in respect of the title of the receiver, the court held that as he had not qualified when the marshal seized the vessels his title, by relation upon qualification thereafter, should not be carried back so as to antidate the marshal's seizure. In respect to this the court said:

"The contention is not only that the title to these vessels vested in the receiver as of July 31st, and that, in such case as this, constructive is the equivalent of actual possession, but that although the receiver did not qualify until after the seizure by the marshal,

he, thereupon, became constructively possessed of the vessels as of July 31st, and the jurisdiction of the district court was thereby ousted. But, if the jurisdiction had attached, it would not be defeated even by the withdrawal of the property for the purpose of the State court, and, moreover, the doctrine of relation has no application. As between two courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject-matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its right to do so, because it may not have first obtained physical possession of the property in dispute. But where the jurisdiction is not concurrent and the subject-matter in litigation in the one is not within the cognizance of the other, while actual, or, even constructive, possession may, for the time being, and in order to avoid unseemly collision, prevent the one from disturbing such possession, yet where there is neither actual nor constructive possession there is no obstacle to proceeding, and action thus taken cannot be invalidated by relation. That doctrine is resorted to only for the advancement of justice, and, under these State statutes, is adopted to defeat fraudulent, unwarranted and unjust dispositions of the debtor's property and to
87 accomplish just and equitable ends. Herring *v.* N. Y., Lake Erie, &c., Railroad, 105 N. Y. 340, 377.

"At the time these libels were filed and the marshal seized the property it had not been developed whether or when the receiver would or might give the security required and enter upon the discharge of his duties, and he had neither actual nor constructive possession."

The case furnishes no reason for drawing any distinction between actual and constructive possession of the choses in action of the Mutual Reserve Fund Life Association. The subject-matter of the litigation was one in respect to which the jurisdiction of the two courts was concurrent. The receiver of the State court had actually qualified and had served notice of his appointment and authority upon the debtors of the mutual association. The receiver was, therefore, in constructive possession of the assets before the interference of the United States court was solicited. The case in this respect falls within the very distinction recognized by the chief justice, when he said:

"As between courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject-matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its right to do so because it may not have first obtained physical possession of the property in dispute."

The rule thus stated is supported in the case of Peck *v.* Jenness, 7 How. 624; Freeman *v.* Howe, 20 How. 450; Covell *v.* Heyman, 111 U. S. 176; Buck *v.* Colbath, 3 Wall. 334.

That the property of a stranger to the proceeding has been taken, will not justify a writ of replevin or any other dispossessory or injunctive proceeding in the court of another jurisdiction, is well set-

ed. Freeman *v.* Howe, Buck *v.* Colbath and Covell *v.* Heyman, ted above.

In American Association *v.* Hurst, 7 C. C. A. 598, the facts were hat the property of a stranger to a writ from a State court was levied n and was about to be sold to satisfy a judgment against another. An injunction was sought from a circuit court of the United States o restrain such taking. The writ was denied below, and the efusal affirmed by this court. Judge Taft, speaking for this court aid:

"The principle is that, in order to preserve the dignity and protect the effectiveness of the process of courts of concurrent 88 jurisdiction, and to avoid unseemly conflicts between them, and between their respective executive officers, no remedy of an injunctive or dispossessory character will be afforded by one court against the acts of the executive officers of the other court, when done under color of an order or process issuing from such other court, because it would have the inconvenient and anomalous effect to stay the proceedings in one court to allow another court to investigate the validity of acts done under such proceedings."

No case has been called to our attention which sanctions the contention of counsel, that the mere fact that the jurisdiction of the State court is challenged will justify the enjoining of one court by another. The State and Federal courts are independent of each other, except in a limited class of cases, when a writ of error will lie from the highest court of a State to the Supreme Court of the United States. They are courts of equal dignity and of concurrent jurisdiction in respect to the subject-matter of this controversy. Neither court has the power to control or coerce the other. If the circuit court of the United States has the power and jurisdiction when diversity of citizenship exists, to enjoin and dispossess a receiver, acting under authority of the Jefferson circuit court, upon a bill averring a defect of jurisdiction, the other must have an equal right upon a case arising presenting similar jurisdictional questions. The power must be reciprocal if it exists. We entirely approve the view expressed by District Judge Love, in Senior *v.* Pierce, 31 F. R. 625, 631, in saying that:

"Inasmuch as the very purpose of non-interference is to prevent a conflict between the two jurisdictions, I can see no difference in the application of the principle whether the question to be decided by the two courts is one of jurisdiction, or of mere property right, the jurisdiction being conceded. The State court must needs decide for itself whether or not the seizure proceeding was illegal. There is no other tribunal with competent authority to decide this question for the State court. If the Federal court may decide the question of the regularity of the seizure and jurisdiction adversely to the State court, and proceed to take the property from its custody by force, why may not the State court reciprocally, in any parallel case, decide the same questions when property is in our custody, and proceed by a writ of replevin to dispossess the marshal? But, assuredly, if the Federal court were in possession by legal process, it would not permit the State court to decide the question of jurisdiction, and wrest the prop-

erty from our control. The only safe and legitimate course for the suitor is to pursue his remedy by some proper ancillary proceeding in the court first obtaining jurisdiction, and take his appeal, if not satisfied, to the final justice of the supreme court of the State,
89 or of the United States, as the case may require. It will not do for the suitor to assume that he cannot obtain justice in one jurisdiction or the other. But at all events, it is infinitely better that injustice should be done and suffered in particular cases than that a course of proceeding should be sustained fraught with all the evils of conflicting judgments and forcible collisions between the two independent jurisdictions."

Inasmuch as no relief whatever can be obtained unless the proceedings in the State court can be enjoined the cause will be remanded with direction to dismiss the bill for want of equity and to dissolve the injunction.

90 And afterwards to wit on January 23rd 1902 a petition to rehear said cause was filed which reads and is as follows:

Petition for Rehearing.

91 United States Circuit Court of Appeals, Sixth Circuit.

JAMES S. PHELPS ET AL., Appellants,
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION, Appellee. } No. 955.

Appeal from the circuit court of the United States for the district of Kentucky.

Petition for a rehearing.

We are extremely reluctant to ask a court that considers its cases so thoroughly as this court a rehearing of any question, and, notwithstanding our confidence in our position, would not now ask it except for the peculiarly prejudicial position in which this court's judgment leaves us.

Under *section 5, act of March* 3, 1891, appellee, complainant below, has a right of appeal to the supreme court, because the jurisdiction of the circuit court is in issue, and the case involves the construction and application of the Federal Constitution forbidding denial
92 of due process; but if the supreme court reverse the decree which the circuit court must enter in accordance with the principles announced by this court, dismissing our bill, we should nevertheless have been deprived of the fruits of the judgment of the supreme court because pending appeal defendants, acting under the authority of the State judge, would have demoralized our policyholders and ruined our business. On the other hand, should this court grant a rehearing and certify the questions involved, as it may do under authority of *Gableman vs. Peoria, &c., Co.*, 101 *Fed. R.* 1; *S. C.* 179 *U. S.* 335, the ends of justice would, as far as practicable, be attained.

I.

The first point determined against us is thus stated by this court, speaking of State court's decision:

"Having appeared for the purpose of challenging the jurisdiction of the court, the decision of the court upon that issue is conclusive until annulled or reversed by some court having jurisdiction to revise and correct that error."

No authority is cited in support of this proposition. If the State court's decision turn out erroneous, the decision of this court
93 is that the State court acting without jurisdiction has precluded appellee by a decision that it had jurisdiction. On this proposition the supreme court says:

"The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground or what we consider as intended, that the service be set aside; nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when, being urged, it is overruled and the defendant is thereby compelled to answer. He is not considered as abandoning his objection, because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality that the objection is deemed to be waived."

This was said in a case where process was served beyond the territorial bailiwick of the sheriff, and defendant appeared specially (as did appellee) to quash the service. *Harkness vs. Hyde*, 98 *U. S.* 478.

Harkness vs. Hyde has been repeatedly reaffirmed; see *Sou. Pac. Co. vs. Denton*, 146 *U. S.* 202; *Mex. Cent. R. Co. vs. Pinkney*, 149 *U. S.* 209; *Goldey vs. Morning News*, 156 *U. S.* 518, *etc.*

94 In *York vs. Texas*, 137 *U. S.* 15, the court, sustaining a Texas statute imposing the penalty of submitting to the jurisdiction upon one unsuccessfully questioning the jurisdiction of the State court, said, nevertheless:

"It must be conceded that such statutes contravene the established rule elsewhere—a rule which also obtained in Texas at an earlier day, to wit, that an appearance which, as expressed, is solely to challenge the jurisdiction is not a general appearance in the cause, and does not waive the illegality of the service or submit the party to the jurisdiction of the court. *Harkness vs. Hyde*, 98 *U. S.* 476, *etc.*

"The difference between the present rule in Texas and elsewhere is simply this: Elsewhere the defendant may obtain the judgment of the court upon the sufficiency of the service without submitting himself to its jurisdiction. In Texas, by its statute, if he ask the court to determine any question, even that of service, he submits himself wholly to its jurisdiction. Elsewhere he gets an opinion of the court before deciding on his own action. In Texas he takes all

the risk himself. If the service be in fact insufficient, all subsequent proceedings, including the formal entry of judgment, are void; if sufficient they are valid," etc.

Accordingly, with great diffidence, we suggest that the court has overlooked the authorities controlling on this question in concluding that appellee waived the State court's error in appearing specially to challenge its jurisdiction.

95 The principle of *Harkness vs. Hyde* was reaffirmed in an excellent opinion in *C. O. & S. W. R. R. Co. vs. Heath's Adm'r*, 87 *Ky.* 659, where the court, after citing *Harkness vs. Hyde*, said that so far from the special appearance of defendant to quash the service, being a waiver of the question of jurisdiction, it was the duty of the defendant to apprise the court of the impropriety of the service.

The *Heath case* was expressly reaffirmed in *N. N. & M. V. Co. vs. Thomas*, 96 *Ky.* 613; and the same doctrine again declared in *Sun Mut. Ins. Co. vs. Crist*, 19 *Ky. L. R.* 306 (March 26, 1897).

There is, therefore, no foundation whatever in Kentucky authorities for the position of the State judge on this question.

II.

In reversing, this court rejects the circuit court's construction of Kentucky statutes, and adopts the State court's. It is not asserted that the State court's proceeding is supported by any precedent. No authority is cited for it by the State court or appellants' counsel, and the ground upon which it is sustained is not clear.

Riggs vs. Johnson County is no authority upon the construction of *sec. 298 or 439, Kentucky Code.* The proposition, there announced, that jurisdiction does not end with judgment, but continues

96 until execution, is not questioned by appellee. We simply contend that such "execution" is governed by Kentucky law, and the procedure here adopted is not thereby authorized.

Sec. 298 simply authorized an interlocutory order appointing a receiver *before judgment;* such receivership is no part of the process of execution of a judgment.

Sec. 439, whether the action it requires to be *instituted* be ancillary or not, *certainly requires process.* This follows not only from the requirement of "*instituting*" an action, but from *sec. 70*, providing: "An action upon a return of no property found, pursuant to sec. 439, must be brought in the county in which the judgment is rendered, or in which the defendant resides, or is summoned."

If the action may be brought in a county different from that wherein the judgment is rendered, is it possible that it may be without summons? And if this were possible, what disposition is to be made of the concluding words "or is *summoned*"? What is the meaning of providing for instituting an action in the county where the defendant "*is summoned*" if *summons* is not contemplated? With great deference we submit that no instance can be found of record where any Kentucky court ever previously decided,

97 or any Kentucky lawyer ever insisted in a Kentucky court that a summons was not required in an action under *sec. 439.*

If required by Kentucky statute, *then due process of law requires it*, under supreme court decisions.

Not only is summons required in every action begun in Kentucky, but it is even required on every amended petition filed *before judgment* where a new cause of action is asserted; *see Supplemental Brief, p. 5, etc.*, and Kentucky cases reviewed. *Lang vs. Rigney*, 160 *U. S.* 531, 542, construing the laws of New Jersey, is, therefore, inapplicable.

This court says (*p.* 10):

"This appointment was made without other than constructive notice. * * * Was the court powerless because the defendant debtor was a foreign corporation," *etc.?*

There was no "constructive" notice; there was no notice at all. There was no process. "Constructive" process is perfectly defined in Kentucky statutes; see *Code, title IV, chap. II, art. II*, entitled "Constructive service," beginning *sec. 57*.

Sec. 60 provides when one is deemed "constructively summond." Tested by these statutes appellee was never "constructively summoned." Had even an attempt been made at constructive
98 service, appellee might have tested its regularity, or, had a summons been issued in an action instituted under *sec 439*, appellee might have appeared specially to question the court's jurisdiction, as held in *Harkness vs. Hyde supra*. But when no process is taken, appellee cannot appear at all, except voluntarily. Any appearance would have been voluntary, and have waived objection to jurisdiction. In short, upon the doctrine invoked, the State court by assuming to act without process, might obtain jurisdiction to determine the interests of all non-residents.

In *Pennoyer vs. Neff* the court said that the law presumed opportunity in a non-resident to obtain notice under *constructive process*, but no court previously to the action of the State court in this case has ever held the presumption of notice when there was no process.

III.

We shall not inflict a reargument of the questions involved in the construction of *sec. 720 R. S. U. S.*, but submit that their importance, as is recognized in the elaborate and learned opinion of this court in this case, is such as to require final settlement by the final arbiter, the Supreme Court. We earnestly appeal to this
99 court to certify to that court the question of the court's jurisdiction, and the application of the fourteenth amendment requiring due process; or if this court *be advised to the contrary*, that it in its mandate direct the circuit court, instead of dissolving the injunction by interlocutory order, to dismiss the bill, as is authorized by *Bissell vs. Goshen, etc.*, 72 *Fed. R.* 545, *and Smith vs. Vulcan Iron Works*, 165 *U. S.* 518, and we now avow that we are ready to unite with appellants in a request to the supreme court to advance the hearing.

With great deference we submit this petition.

PIRTLE & TRABUE, *Of Counsel.*

GEO. BURNHAM, JR.,
SEWELL T. TYNG,
WILLIAM D. GUTHRIE,
Counsel.

Certificate.

Edmund F. Trabue certifies that he has from the inception of this case been of counsel for appellee in the circuit court and in this court, and that in his opinion this petition is well founded in point of law, and further certifies that it is not filed or interposed for delay.

EDMUND F. TRABUE.

100 And afterwards to wit on February 4th 1902, a decree on petition to rehear was rendered in said cause which is in the words and figures as follows:

Decree on Rehearing.

101 United States Circuit Court of Appeals for the Sixth Circuit.

JAMES S. PHELPS & THE FIDELITY TRUST & SAFETY Vault Co.
v.
MUTUAL RESERVE FUND LIFE ASSOCIATION. } No. 955.

Appeal from the circuit court of the United States for the western district of Kentucky.

This cause came on to be heard on a petition for rehearing.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court, in this cause be and the same is hereby reversed with costs and the cause is remanded to said court with directions to dismiss the bill of complaint.

102 And on February 5th 1902, a petition for appeal was filed in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

JAMES S. PHELPS and FIDELITY TRUST & SAFETY Vault Company, Appellants,
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION, Appellee. } # 995. Petition for Appeal.

The above-named Mutual Reserve Fund Life Association conceiving itself aggrieved by the judgment made and entered in the above-entitled cause, on the 4th day of February, 1902, wherein it is adjudged that the decree of the circuit court of the United States for

the western district of Kentucky be reversed and petitioner's bill of complaint be dismissed, presents herewith its assignment of errors, and prays an appeal from said judgment of the United States circuit court of appeals to the Supreme Court of the United States, and that the injunction granted by the circuit court aforesaid be continued in force pending the consideration and determinat' by the United States Supreme Court of said appeal.

EDMUND F. TRABUE,
Counsel for the Appellant, Mutual Reserve Fund Life Association.

And afterwards on the same day to wit on February 5th 1902, an order granting appeal was entered which reads and is as follows:

103 United States Circuit Court of Appeals for the Sixth Circuit.

JAMES S. PHELPS & FIDELITY TRUST & SAFETY VAULT CO., Appellants,
vs.
MUTUAL RESERVE FUND LIFE ASS'N, Appellee. } # 955.

The appeal prayed by the Mutual Reserve Fund Life Association in this case is hereby allowed.

It is ordered that the injunction granted herein by the circuit court of the United States for the western district of Kentucky be continued in full force pending the determination of this appeal by the Supreme Court of the United States, upon the said Mutual Reserve Fund Life Association executing a bond in the sum of four thousand seven hundred and twenty ($4720) dollars, to James S. Phelps and The Fidelity Trust & Safety Vault Co., appellees; said bond to be conditioned that the said Mutual Reserve Fund Life Association shall prosecute its appeal to effect, and if it fail to make said appeal good, shall answer to said appellees for the amount of the judgment enjoined by the order of the circuit court of the United States aforesaid, and all damages and costs.

104 And afterwards to wit on February 5th 1902, assignments of error were filed in said cause which read and are as follows:

105 Supreme Court of the United States.

MUTUAL RESERVE FUND LIFE ASSOCIATION, Appellant,
vs.
JAMES S. PHELPS and FIDELITY TRUST & SAFETY VAULT COMPANY, Appellee.

Afterward, to wit; on the 4th day of February, 1902, at the Oct. term for 1901 of the Supreme Court, at the Capitol in the city of Washington, District of Columbia, comes the said Mutual Reserve Fund Life Association, by Edmund F. Trabue, its counsel, and says that in the record of proceedings in the above-entitled matter in the

United States circuit court of appeals for the sixth circuit, there is manifest error in this, to wit:

I. In the decision of said court of appeals to the effect that the circuit court of the United States for the district of Kentucky was deprived of jurisdiction of the suit of this petitioner by the provisions of section 720 of the Revised Statutes of the United States.

II. In the decision of the said court of appeals that said section 720 of said Revised Statutes forbade said circuit court of the United States to issue the injunction which was granted by said court in said suit wherein this petitioner was complainant and James S. Phelps and Fidelity Trust & Safety Vault Company were defendants.

III. In the decision of said court of appeals that this petitioner having appeared in the Jefferson circuit court, a State court of the State of Kentucky, in the action instituted in the said court against it, wherein the said James S. Phelps was plaintiff and appellant, de-
fendant, for the purpose of challenging said State court's juris-
106 diction, the decision of said State court that it had jurisdiction of said action was conclusive of its jurisdiction to render the judgment which it assumed to render against appellant May 19, 1900.

IV. In the decision of said court of appeals to the effect that the said State court had jurisdiction in said action on the so-called amended and supplemental petition, which said Phelps assumed to file therein August 4, 1900, to appoint the receiver which it therein assumed to appoint when no summons or other process had ever issued on said so-called amended and supplemental petition.

V. In the decision of said court of appeals that the so-called order of the State court assuming to appoint the receiver aforesaid was a "proceeding" within the intent and meaning of section 720 of said Revised Statutes, and that the so-called receiver was an officer of the State court within the meaning and intent of said section of said statutes, even if, and although said State court should have been without jurisdiction to make the said order appointing said receiver.

VI. In the decision of said court of appeals in reversing the decree of said circuit court granting injunction and directing the said circuit court to dismiss appellant's bill of complaint;

Wherefore the said Mutual Reserve Fund Life Association prays that the judgment of the said United States circuit court of appeals for the sixth circuit be reversed and that the said court of appeals be ordered to set aside its judgment now appealed from and enter a judgment affirming the aforesaid decree of the circuit court of the United States for the western district of Kentucky.

EDMUND F. TRABUE,
Counsel for Appellant.

107 And afterwards to wit on February 7th 1902, bond on appeal was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

JAMES S. PHELPS and FIDELITY TRUST & SAFETY VAULT Company
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION. } # 955.

Know all men by these presents, that the Mutual Reserve Fund Life Association, a corporation, as principal, and the Fidelity & Deposit Company, of Maryland, a corporation, as surety, are held and firmly bound unto the appellees, James S. Phelps and Fidelity Trust & Safety Vault Company, in case # 955 United States circuit court of appeals for the sixth circuit, their executors, administrators, and assigns, in the sum of $4720; for the payment thereof well and truly to be made they bind themselves, their successors, executors and administrators jointly and severally by these presents.

Done this 4th day of February, 1902.

Whereas, the above-named Mutual Reserve Fund Life Association has prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered by said United States circuit court of appeals for the sixth circuit in the above-entitled case.

Now, therefore, the condition of th. obligation is such that if the said appellant, Mutual Reserve Fund Life Association shall prosecute said appeal to effect, and if it fail to make said appeal good, shall answer to said appellees for the amount of the judgment enjoined by the order of the circuit court of the United States afore-
108 said, and all damages and costs, then this obligation shall be void, otherwise shall be and remain in full force and virtue.

MUTUAL RESERVE FUND LIFE ASSOCIATION,
By EDMUND F. TRABUE, *Attorney.*
FIDELITY & DEPOSIT CO. OF MD.,
By SPENCER M. JONES, *Res. Vice-Pres.*,
By JOHN P. RYAN, *Res. Ass't Sec'y.* [SEAL.]

Accepted and approved:
HORACE H. LURTON,
Presiding Judge, Court of Appeals.

And afterwards to wit on February 4th 1902, a citation was filed in said cause which reads and is as follows:

Citation.

109 Case No. 955.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to James S. Phelps and the Fidelity Trust and Safety Vault Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the Capitol, in the city of Washington, District of Columbia, within thirty days from

the date of this writ, pursuant to an appeal filed in the clerk's office of the United States circuit court of appeals for the sixth circuit, wherein The Mutual Reserve Fund Life Association is appellant, and you are appellees, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 4th day of February, A. D. 1902, and of the Independence of the United States one hundred and twenty-sixth.

HORACE H. LURTON,
Presiding Judge of the United States Circuit Court of Appeals for the Sixth Circuit.

—— ——, *Clerk.*

Service of the foregoing citation accepted.

BENJAMIN F. WASHER,
Counsel for James S. Phelps, Fidelity Trust & Safety Vault Company.

[Endorsed:] Citation Filed Feb. 11 1902 Frank O. Loveland, clerk.

110 And afterwards to wit on March 3rd 1902, an order was entered in said cause in said court which reads *as* is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

JAMES S. PHELPS ET AL.
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION.

It appearing that under misapprehension the appellant omitted to file certain assignments of error in the decision, or in the judgment of this court and that such assignments might be regarded as important to a complete review by the Supreme Court, of the judgment of this court;

Therefore, it is ordered that said assignments of error be filed *nunc pro tunc* as of the 5th day of February, 1902, the time of filing appellant's petition for appeal.

111 And afterwards to wit on March 3rd, 1902, the following assignments of error were filed:

The Supreme Court of the United States.

MUTUAL RESERVE FUND LIFE ASSOCIATION, Appellant,
vs.
JAMES S. PHELPS and FIDELITY TRUST & SAFETY VAULT COMPANY, Appellees.

Assignments of Error.

Appellant, by Edmund F. Trabue, its counsel, says that in the record of proceedings in the above-entitled matter in the United States circuit court of appeals for the sixth circuit, there is manifest error in this, to wit:

In the decision of said court of appeals that the State court mentioned in its decision, had jurisdiction to appoint the receiver in question, when no summons or other process had been issued on the so-called amended and supplemental petition; and in failing and declining to decide that the said State court in appointing the said receiver, when no summons or other process had been issued on the so-called amended and supplemental petition, did take the property of appellant, Mutual Reserve Fund Life Association, without due process of law and in violation of the 14th amendment of the Constitution of the United States.

That there is also manifest error in this, to wit:

In said court of appeals failing to hold according to the insistence of said appellant, Mutual Reserve Fund Life Association, that section 720 of the Revised Statutes of the United States as construed by that court was in conflict with the 14th amendment to the
112 Constitution of the United States, forbidding the State court to take said appellant's property without due process of law.

Also manifest error in this, to wit:

In said court of appeals failing to hold according to the insistence of the said appellant, that said section 720 of the Revised Statutes aforesaid as construed by said court of appeals was in conflict with the 14th amendment of the Constitution of the United States forbidding said State court to take said appellant's property without due process of law, as, and inasmuch as an injunction issued by the United States circuit court forbidden by said section 720 of said statutes as construed by said court of appeals afforded said appellant the only adequate and effectual remedy of enforcing said prohibition made by the said 14th amendment, and the only adequate and effectual remedy to prevent said State court's taking said appellant's property without due process of law.

Wherefore, said appellant prays, as heretofore prayed, that the judgment of said United States circuit court of appeals be reversed and the said court of appeals be ordered to set aside its judgment now appealed from and enter a judgment affirming the decree made in this suit by the circuit court of the United States for the western district of Kentucky.

EDMUND F. TRABUE,
Counsel for Appellant,
Mutual Reserve Fund Life Association.

113 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record in the case of Mutual Reserve Fund Life Association *vs.* James S. Phelps and Fidelity Trust & Safety Vault Co., No. 955, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the city of Cincinnati, Ohio, this 3d day of March, A. D. 1902.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 18,437. U. S. C. C. of appeals, 6th circuit. Term No. 263. Mutual Reserve Fund Life Association, appellant, *vs.* James S. Phelps and Fidelity Trust & Safety Vault Company. Filed March 5th, 1902.

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 263.

Office Supreme Court U. S.
FILED
APR 16 1903
JAMES H. McKENNEY,
Clerk.

MUTUAL RESERVE FUND LIFE ASSOCIATION,
Appellant,

against

JAMES S. PHELPS and FIDELITY TRUST AND SAFETY VAULT COMPANY.

Appeal from the Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR APPELLANT.

WILLIAM D. GUTHRIE,
EDMUND F. TRABUE,
GEORGE BURNHAM, JR.,
SEWELL T. TYNG,
Of counsel for appellant.

WASHINGTON, April 14, 1903.

[18,437.]

No. 263

Motion to advance

Filed Apr. 29, 1902.

Office Supreme Court U.S.
FILED
APR 29 1902
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 584.

MUTUAL RESERVE FUND LIFE ASSOCIATION,
Appellant,

vs.

JAMES S. PHELPS AND THE FIDELITY TRUST AND SAFETY VAULT COMPANY
Appellees.

Appeal from the Circuit Court of Appeals for the Sixth Circuit.

MOTION TO ADVANCE UNDER RULE 26.

WILLIAM D. GUTHRIE,
GEORGE BURNHAM, JR.,
EDMUND F. TRABUE,
Of counsel for appellant.

[18,437.]

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1901.

No. 584.

MUTUAL RESERVE FUND LIFE ASSOCIATION,
Appellant,
vs.
JAMES S. PHELPS and the FIDELITY TRUST AND SAFETY VAULT COMPANY,
Appellees.

Appeal from the Circuit Court of Appeals for the Sixth Circuit.

NOTICE OF MOTION TO ADVANCE UNDER RULE 26.

Notice is hereby given that, upon the record in the above entitled case, the annexed motion to advance the same upon the docket and set it down for hearing at as early a day as may be convenient to the court will be presented and submitted to the Supreme Court of the United States at the Capitol, in the City of Washington, on Monday, the 5th day of May, 1902, at the opening of court on that day, or as soon thereafter as counsel can be heard.

April 24, 1902.

WILLIAM D. GUTHRIE,
GEORGE BURNHAM, JR.,
EDMUND F. TRABUE,
of counsel for appellant.

To

ZACK PHELPS and
BENJAMIN F. WASHER, Esqs.,
of counsel for appellees.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1901.

No. 584.

MUTUAL RESERVE FUND LIFE ASSOCIATION,
Appellant,

vs.

JAMES S. PHELPS and the FIDELITY TRUST AND SAFETY VAULT COMPANY,
Appellees.

Appeal from the Circuit Court of Appeals for the Sixth Circuit.

MOTION TO ADVANCE UNDER RULE 26.

The appellant in the above-entitled case moves upon the record that this case be advanced for argument, and respectfully submits the following reasons why the motion should be granted, viz.

I.

The fundamental question in this case is whether a federal court can enjoin a receiver appointed by a state court and acting under a judgment void because of want of due process and under an order of appointment, similarly void, and hence in conflict with the Fourteenth Amendment of the Constitution of the United States, or whether the power is denied by section 720 of the Revised Statutes, providing that, except when authorized by a bankruptcy law, "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state."

Briefly stated, the facts are that the circuit court of the United States for the district of Kentucky granted

an interlocutory injunction restraining the Fidelity Trust and Safety Vault Company, a receiver appointed by the state court, from collecting premiums and assessments due from policy-holders of the appellant association and applying the same to the payment of an alleged void judgment in favor of Phelps upon the ground that the order appointing the receiver was void and without due process. This decision was, however, reversed in the Circuit Court of Appeals, which based its decision mainly upon section 720 of the Revised Statutes (*Phelps* v. *Mutual Reserve Fund Life Ass'n*, 112 Fed. Rep. 453).

On the one hand, the appellant contends that the trust company, as receiver, is a mere trespasser unlawfully interfering with its business, that the fact that a receiver appointed by a state court attempts to justify such trespass under a void judgment or void order is of no more effect than if it were acting under a void or unconstitutional statute, and that if the case otherwise presents features justifying relief in equity, section 720 of the Revised Statutes does not deprive a federal court of equity of jurisdiction. On the other hand, the appellees contend that such a receiver, although acting under a void judgment and a void order, cannot be restrained by a federal court because of the restriction contained in section 720.

II.

The constitutional question involved is novel and important and has never been decided by this court. Pending an adjudication in this court, the uncertainty as to the final outcome of the litigation and as to the relation between the appellant and its policy-holders, threatens a

multiplicity of similar suits, many of which have already been instituted, and will seriously embarrass the collection of premiums and assessments, which are absolutely necessary for the payment of death claims. The number of policy-holders affected by this litigation is many thousand, and the delay of two years which will result if the case must take its regular order upon the docket may result in widespread loss to innocent beneficiaries, who, under the system of mutual insurance adopted by the association, can only be paid by the appellant from the proceeds of current premiums. If these premiums and assessments are diverted, the death claims must remain unpaid, for no other fund exists with which to pay them. It is submitted that the case is one of extraordinary hardship to a large class and that it is of general and public interest within the rules laid down for advancements. Moreover, there is the danger, if not prospect, of a conflict of jurisdiction between the state and federal courts which should be avoided by a prompt and authoritative adjudication by this court within the doctrine enunciated in *Forsyth* v. *Hammond*, 166 U. S. 506.

III.

The appellant, therefore, prays that the case be advanced upon the docket and heard at as early a day as may be convenient to the court.

Notice of this motion has been served on counsel for the appellees.

WASHINGTON, May 5, 1902.

WILLIAM D. GUTHRIE,
GEORGE BURNHAM, Jr.,
EDMUND F. TRABUE,
of counsel for appellant.

[18,437.]

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 263.

MUTUAL RESERVE FUND LIFE ASSOCIATION, *Appellant,*

AGAINST

JAMES S. PHELPS and FIDELITY TRUST AND SAFETY VAULT COMPANY.

Appeal from the Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a decision of the Circuit Court of Appeals for the sixth circuit, rendered December 3, 1901 (112 Fed. Rep. 453), reversing an interlocutory decree of the Circuit Court of the United States for the western district of Kentucky (103 Fed. Rep. 515). The appellant Association exhibited its bill of complaint in the Circuit Court, invoking the federal jurisdiction both on the ground of diverse citizenship and of a right arising under the Constitution of the United States. The object of the bill was to restrain the appellees from proceeding under an order of the Circuit Court of Jefferson County, Kentucky, appointing the appellee company receiver of the appellant Association at the suit of appellee Phelps. In support of its prayer for an injunction, the Associa-

tion averred that the order of the state court was void for lack of jurisdiction; that its enforcement, which was imminent, would injure the Association largely in excess of $2,000; that the injury would also be irreparable, without remedy at law, and would give rise to a multitude of suits; and that, unless the injunction were granted, the Association would be deprived of its property without due process of law, and denied the equal protection of the laws in contravention of the Fourteenth Amendment (record, pp. 1–37). A temporary injunction was granted (p. 9). The defendants demurred to the bill for want of equity and on the ground that the Circuit Court had no jurisdiction to hear and determine the action because the amount involved was insufficient and because of section 720 of the Revised Statutes which prohibits an injunction to stay proceedings in any court of a state, except as authorized in bankruptcy cases (p. 42). Subsequently, the defendants moved to dissolve the preliminary injunction, *solely on the ground that the Circuit Court had no jurisdiction* (pp. 43–44). The averments of the bill were in no way challenged or questioned. This motion was denied (pp. 37–42). Thereupon, the defendants appealed to the Circuit Court of Appeals from the order denying the motion (pp. 44–45) under the 7th section of the judiciary act of March 3, 1891 (26 Stat. 826). Upon this appeal, which thus presented only the question of jurisdiction, the Circuit Court of Appeals held that the facts shown by the bill precluded the Association from obtaining relief in any event because of the lack of power to issue an injunction, and directed that the bill be dismissed without further hearing in the

Circuit Court (pp. 68, 72). The appellant contended that if the order of the state court, although valid on its face, was shown to be utterly void for want of jurisdiction, the Circuit Court would have jurisdiction to enjoin the execution or enforcement thereof in order to prevent irreparable injury and a multitude of suits, and that such an injunction would not "stay proceedings in any court of a state" within the meaning of section 720 of the Revised Statutes. The decision of the Circuit Court of Appeals was placed upon two grounds: (1) that the order appointing the receiver was not shown to be void for want of jurisdiction in the state court (pp. 54–60); and (2) that relief in any event was prohibited by section 720 of the Revised Statutes (pp. 60–68).

It appears by the bill that in an action in the state court instituted against the Association by Phelps for the recovery of a money judgment, the Association entered a special appearance for the purpose of moving to quash two returns of summonses, purporting to show service thereof upon agents of the Association, upon the ground that the persons served were not such agents (p. 18). The state court overruled this motion, holding that the persons served were agents of the Association (p. 21). Thereafter, judgment by default having been rendered against the Association, and execution issued and returned *nulla bona* (p. 24), an order was made, without notice to the Association, appointing a receiver for the purpose of enforcing the judgment out of equitable assets beyond the reach of execution (pp. 24–26). If, as contended by appellant, the judgment was void for failure to acquire jurisdiction of the person, it is clear that the order

based upon it and made to enforce it is equally void. The principal ground of the decision below that the bill does not establish a lack of jurisdiction in the state court to render the judgment complained of, is that it shows a special appearance by the Association in that court for the purpose of challenging the jurisdiction of the person, and a decision by the court in favor of its own jurisdiction.

There is no question that the bill sufficiently avers the non-agency of the persons served with the summons (pp. 2–4). It is alleged that neither the insurance commissioner nor B. Frese upon whom service was made was an agent of the Association. As to the commissioner, it was shown that he had been appointed an agent for service of process by the Association, a New York insurance corporation, in accordance with a law of the state requiring it as a condition to the transaction of insurance business in the state (§ 631 Ky. Sts. 1899); and that this appointment had been revoked and annulled upon the subsequent exclusion of the Association from doing business in the state (p. 4). As to Frese, it was averred that he was not and never had been an agent of the Association for any purpose (p. 3). It was, however, ruled by the court below that, notwithstanding these allegations were not denied but admitted by the demurrer and motion, the fact must, nevertheless, be taken according to the state court decision. Indeed, were it not for averments showing the special appearance and the decision of the state court that the persons served were agents of the Association, the sole question would be whether execution of a personal judgment rendered by a state court without jurisdiction of the person of the

defendant can be enjoined by a federal court. If, therefore, the learned court below is in error, both as to the conclusiveness of the state court decision and the effect of section 720 of the Revised Statutes, the fact of agency can be questioned only on further hearing in the Circuit Court, to which hearing the appellant is entitled as of right and where it is prepared to litigate and establish its allegations. *Brill* v. *Peckham Motor, etc., Co.*, opinion by Mr. Chief Justice Fuller, April 6, 1903; *Illinois Central R. Co.* v. *Adams*, 180 U. S. 28, 40.

The sufficiency of the amount in controversy to confer jurisdiction was not questioned in the opinion either of the Circuit Court (pp. 37–42) or of the Circuit Court of Appeals (pp. 49–68). The amount of the judgment in the state court sought to be collected was $2,360 (p. 4). Nor could such a doubt reasonably be entertained in view of the averments as to great and irreparable injury, largely in excess of $2,000, which would be suffered from the threatened illegal acts sought to be restrained (pp. 1–2, 5–6). In a suit for injunction, the value of the right to be protected, or the extent of the injury to be prevented, determines the value of the matter in controversy. *Illinois Central R. Co.* v. *Adams*, 180 U. S. 28, 39; *Marshall* v. *Holmes*, 141 U. S. 589, 595; *Humes* v. *City of Ft. Smith*, 93 Fed. Rep. 857, 862; *Nashville, etc., R. Co.* v. *McConnell*, 82 Fed. Rep. 65, 73. And as the averments of the bill must now be taken as true, the jurisdiction in this respect is established. *Blackburn* v. *Portland Gold Min. Co.*, 175 U. S. 571, 574.

As to the right of the Association to equitable relief by injunction, if the order of the state court appointing the receiver is void and if the Circuit Court has power to

enjoin its execution, the necessity for equitable relief is manifest, for the invalidity of the judgment and of the order appointing a receiver does not appear upon their face, and it is clear that the injury which the Association would otherwise suffer could find no remedy in any action at law. *Arrowsmith* v. *Gleason*, 129 U. S. 86, 95, 97, 101; *Dietzsch* v. *Huidekoper*, 103 U. S. 494, 497; *French* v. *Hay*, 22 Wall. 250, 252. As the returns of service of process in the Phelps case in the state court were regular upon their face, and extrinsic evidence was required to show their invalidity, a court of equity was the only tribunal which could afford effectual relief; and the only adequate relief was by injunction. *Robb* v. *Vos*, 155 U. S. 13, 38; *Marshall* v. *Holmes*, 141 U. S. 589, 595.

ASSIGNMENT OF ERRORS.

The various errors assigned are all based upon the direction of the Circuit Court of Appeals to the Circuit Court to dismiss the bill of complaint. For convenience of argument, and in view of the grounds upon which the learned Circuit Court of Appeals proceeded, the reasons for holding this direction to be error may be stated in two propositions, viz.:

(1) A Circuit Court of the United States has jurisdiction to enjoin the execution or enforcement of a judgment of a state court which is wholly void for want of jurisdiction; and

(2) Notwithstanding the decision of the state court in support of its own jurisdiction, the order appointing a receiver of appellant's property may be shown to be wholly void for want of jurisdiction of the person of appellant.

I.

The appeal to this court from the Circuit Court of Appeals was properly granted and can be maintained. It is authorized by section 6 of the act of March 3, 1891, c. 517, 26 Stat. 826, because the jurisdiction of the Circuit Court was placed not only on diverse citizenship but also on a ground independent of that, namely, a controversy arising under the Fourteenth Amendment to the Constitution of the United States. In such cases, as has been ruled by this court, an appeal may be taken from the Circuit Court to the Circuit Court of Appeals, and thereafter the jurisdiction of this court may be invoked directly on another appeal. *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, 477; *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 277, 280; *Huguley Manfg. Co.* v. *Galeton Cotton Mills*, 184 U. S. 290, 295.

In the present case, the appeal to the Circuit Court of Appeals was by the defendants from an interlocutory order or decree overruling their motion to dissolve a preliminary injunction *solely on the ground that the court had no jurisdiction.* The Circuit Court of Appeals reversed this order and remanded the cause to the Circuit Court, "with directions to dissolve the injunction" (p. 49). The opinion of the Circuit Court of Appeals (to which reference may be made, *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, 485), shows that that court held that section 720 of the Revised Statutes prohibited any court of the United States from issuing an injunction to restrain the enforcement or collection of a void judgment entered in a state court acting without jurisdiction, and that as no relief whatever could be obtained in this suit in a federal

court, the Circuit Court should be directed to dismiss the bill (p. 68). Thereafter, a motion for a rehearing was made, and the Circuit Court of Appeals entered a final decree reversing the order appealed from and remanding the cause to the Circuit Court "with directions to dismiss the bill of complaint" (p. 72).

II.

The controlling question on this appeal arises under section 720 of the Revised Statutes, which may be quoted for convenience, viz.:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The allegations of the bill of complaint, which under the defendant's motion must be taken as true and in the aspect most favorable to the pleader, show that relief is sought by way of injunction to restrain the defendants from enforcing the collection of a void judgment entered in a court which it is alleged had no jurisdiction of the person of the defendant in the original action, being the complainant in the present suit. The judgment is valid upon its face. Under the pretended authority of such void judgment, the defendants are taking and threatening steps which must produce great and irreparable damage to the Association and its policyholders and involve innumerable suits. The relief prayed for was an injunction directed only to the parties and enjoining them from interfering with the business and property of the complainant Association by acts of trespass.

Assuming, as is discussed under part III., that the order of the state court appointing the receiver of appellant's property was wholly void for want of jurisdiction, the so-called receiver was in truth no receiver, nor any officer of the state court, and the order was no more binding upon any one than if it had no existence. The receiver acting in execution of such an order was a mere trespasser. That such are the consequences of a total invalidity of the order is too manifest a proposition to admit of question. It was to restrain admitted acts of trespass under color of a void order, by injunction directed against the persons acting under it, that the present suit was instituted. The only result of granting the relief prayed for would be to prevent acts the doing of which would make the actors trespassers and at the same time inflict an irreparable injury on the complainant Association. The question is whether this presents the case of an injunction "to stay proceedings in any court of a State," within the prohibition of section 720 of the Revised Statutes. The appellant's position is that an injunction to restrain the commission of mere acts of trespass under assumed authority of a void order does not "stay proceedings in any court of a state," for it leaves the parties perfectly free to take any steps or to conduct any proceedings in any state court. It is submitted that to stay conceded acts of trespass is not to stay "proceedings" in court within any just meaning of the term. The learned Circuit Court of Appeals declined to give its assent to this position as involving too "narrow a construction of the term," and held that the Circuit Court had

no power to award the injunction "though the state court exceeded its jurisdiction" in making the order (p. 61).

The exact question thus presented by this appeal does not seem ever to have been decided by this court, although the right to issue the writ of injunction in analogous cases has been frequently sanctioned. The true rule would seem to be that while section 720 of the Revised Statutes prohibits an injunction "to stay proceedings in any court of a state," it does not prohibit an injunction against parties who are attempting acts of trespass under color of a void order or judgment. In such a case, not *proceedings within the jurisdiction of any state court*, but the wrongful acts of individuals are restrained. The individuals are left at liberty to proceed in any court for any relief which the state court may grant within its jurisdiction; but the moment they threaten to seize the property of a defendant, he is entitled to enjoin the process when void for want of jurisdiction and to be protected in the possession of his property if otherwise a proper case for equitable relief be made. Indeed, proceedings in a state court never deprive a party of liberty or property without due process of law; the mere entry of a judgment or order touches neither. It is the attempt at enforcement which presents the question of constitutional right and calls for protection. If then the order be void upon its face, ordinarily a defense thereto is ample at law; but if valid upon its face, as in the case at bar, equity will relieve.

This was well pointed out by Mr. Justice Brewer in *York v. Texas*, 137 U. S. 15, 20, in the following language:

> "The Fourteenth Amendment . . . forbids a State to deprive any person of life, liberty or property without due process of law. . . . But the mere entry of a judgment for money, which is void for want of proper service, touches neither. It is only when process is issued thereon or the judgment is sought to be enforced that liberty or property is in present danger. If at that time of immediate attack protection is afforded, the substantial guarantee of the amendment is preserved, and there is no just cause of complaint. . . . If the defendant had taken no notice of this suit, and judgment had been formally entered upon such insufficient service, and under process thereon his property, real or personal, had been seized or threatened with seizure, he could by original action have enjoined the process and protected the possession of his property. If the judgment had been pleaded as defensive to any action brought by him, he would have been free to deny its validity."

So, in the leading case of *Pennoyer* v. *Neff*, 95 U. S. 714, 732, it was held that a personal judgment rendered without due service of process "can be treated in any State of this Union as contrary to the first principles of justice, and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the state where rendered," that "the courts of the United States are not required to give effect to judgments of this character when any right is claimed under them," and that "since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the state resisted, on the ground that proceedings in a court of justice to determine the personal rights

and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."

The exact question was presented in the case of *Northern Pacific Ry. Co.* v. *Kurtzman*, 82 Fed. Rep. 241, 243, under a demurrer to the bill of complaint, which, among other things, sought to restrain a threatened sale of lands under tax proceedings instituted in a state court. Hanford, D. J., delivering the opinion of the Circuit Court and overruling the demurrer, used the following language:

> "In the argument, counsel for the defendant treated the case as one in which the primary object is to enjoin proceedings to enforce a decree rendered by the superior court of the state in and for Franklin county. I recognize the absolute correctness of the proposition that the federal courts are forbidden by express provisions in the laws enacted by congress to issue injunctions to stay proceedings in any court of a state, but that principle is not applicable where the suit in the federal court is a direct attack upon a judgment rendered in a state court for the purpose of nullifying such judgment, upon the ground that the same was obtained by fraud, or because the court in which such judgment appears of record had no jurisdiction to render the same. In the exercise of their general equity powers, the circuit courts of the United States have always been free to grant relief of this nature in cases coming within their jurisdiction. *Galpin* v. *Page*, 18 Wall. 351–375; *Pennoyer* v. *Neff*, 95 U. S. 714–748; *Arrowsmith* v. *Gleason*, 129 U. S. 86–101, *Marshall* v. *Holmes*, 141 U. S. 589–601. The bill of complaint attacks the judgment of the superior court on the ground that it acted without jurisdiction in rendering the judgments."

In *Terre Haute, etc., R. Co.* v. *Peoria, etc., R. Co.*, 82 Fed. Rep. 943, 946, Grosscup, D. J., said:

"These statutes, conferring jurisdiction in all cases arising in law or in equity, where certain conditions exist, were not intended to confer merely fractional jurisdiction. The right of the federal court to take cognizance of the controversies arising in such cases, with all the remedies usually applied in law and in equity, was clearly contemplated. Section 720 could never have been intended to trench upon this grant of jurisdictional domain. Such interpretation would imply an intention on the part of congress to repeal a portion of the power expressly given to the courts, both by the constitution and the judiciary act. In their literal scope, the constitution and statutes conferring jurisdiction, and this section 720, are in conflict, and to the extent of such conflict the legal effect of the latter statute must be narrowed down. The cases cited, and a line of cases in the supreme court of the United States, of which they are a development, clearly show that this is the interpretation put upon these two apparently inconsistent lines of legislation.

But the jurisdiction of the federal circuit court is extended only to distinct cases in law or in equity, where the stated condition prevails. Power is not thereby conferred to take jurisdiction of causes pending in the state court, or phases of such causes, such as proceedings tantamount to the common-law practice of moving to set aside a judgment for irregularities, or tantamount to a writ of error or bill of review. All such causes, however independently instituted, are, in their nature, merely parts of the cause to which they are related. The courts of the United States cannot establish a right to review proceedings of the state courts by any such assumption of jurisdiction. The case over which the courts of the United States can obtain jurisdiction, and, with it, carry the right of injunction, other con-

> ditions precedent existing, must be a distinct and separate cause of action, as distinguished from a merely ancillary action."

The difference between staying proceedings in a court and restraining trespass under a void judgment or order of a court acting without jurisdiction is fundamental. Thus, the federal courts will not restrain the institution of suits in a state court under unconstitutional statutes as in *Fitts* v. *McGhee*, 172 U. S. 516, 529, or in any way interfere with proceedings therein; but it is submitted, that as soon as those proceedings ripen into an alleged judgment which judgment is void, the steps of individuals seeking to enforce it may be enjoined within the principle of *Osborn* v. *Bank of the United States*, 9 Wheat. 738, and *Smyth* v. *Ames*, 169 U. S. 466. Thus, in *Fitts* v. *McGhee*, the judgment was reversed because it restrained the *institution* or *prosecution* of *proceedings* in a state court; yet it was distinctly recognized that a different question would be presented "if the individual defendants held possession, or were about to take possession of, or to commit any trespass upon, any property belonging to or under the control of the plaintiffs, in violation of the latter's constitutional rights." So, too, in criminal cases, no federal court could interfere to impede or avert a threatened prosecution in a state court under an unconstitutional statute, even though it were alleged that the state court had no jurisdiction; but as soon as the proceeding ripened into judgment and no adequate appeal existed, relief would be granted under *habeas corpus*, or if property rights were involved, a court of equity could enjoin any individual or officer seeking

to enforce the void judgment. The pendency of proceedings in a state court, whether civil or criminal, does not of itself require or warrant interference by a federal court. Public policy and due regard for considerations of comity would prevent interference under general principles of justice. It cannot be assumed that a state court will not proceed according to the constitution. But, if it does proceed unto judgment without due process of law and a proper case is otherwise made for relief in equity, a federal court may restrain individuals from availing of the judgment. However anxious and solicitous the federal courts may be to avoid conflicts of jurisdiction, they cannot deny suitors due protection of their constitutional rights. As the Circuit Court of Appeals, seventh circuit, said in *Baltimore & O. R. Co.* v. *Wabash R. Co.*, 119 Fed. Rep. 678, 681, speaking through Circuit Judge Jenkins:

> "We are anxious and should strive to avoid all possible and unnecessary conflict between federal and state courts, but we are not at liberty to deny jurisdiction when it is rightly invoked."

The cases presenting the closest analogy to the present question are those brought in the federal courts for relief by way of injunction against judgments of state courts obtained by fraud and to restrain proceedings thereon. Of course, the case of a state court acting without jurisdiction must needs be infinitely stronger in favor of an injunction than a case where the state court had jurisdiction of the person and the ground of injunction was fraud in the proceedings. In these fraud cases, it has always been argued that relief by injunction could not be granted because of the prohibition contained in section 720 of

the Revised Statutes, and because of the danger of conflicts of jurisdiction; but this court has nevertheless uniformly supported the jurisdiction. Thus, in the case of *Marshall* v. *Holmes*, 141 U. S. 589, 599, Mr. Justice Harlan, speaking for the court, reviewed the authorities, and said:

> "These authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained in the court of another jurisdiction. While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. It would simply take from him the benefit of judgments obtained by fraud."

Another class of analogous cases is where suit is brought in equity to obtain relief against judgments based upon the unauthorized appearance of attorneys, of which *French* v. *Hay*, 22 Wall. 238, 248, and *Robb* v. *Vos*, 155 U. S. 13, 38, are examples.

In the latter case, the suit was instituted in the United States Circuit Court, and objections to the jurisdiction were overruled in the following language by Mr. Justice Shiras (at p. 38):

> "As the proceedings in the Gugenheim case were regular upon their face, and extrinsic evidence was required to show their invalidity, we think a court of equity was the proper tribunal

to afford effectual relief. *Slater* v. *Maxwell*, 6 Wall. 268; *Cocks* v. *Izard*, 7 Wall. 559; *Oelrichs* v. *Spain*, 15 Wall. 211, 228; Freeman on Judgments, §§ 499 and 500.

Nor do we think that the contention, that for the Circuit Court of the United States to grant such relief would be to interfere with the jurisdiction of the state court, is well founded. *Pennoyer* v. *Neff*, 95 U. S. 714; *Johnson* v. *Waters*, 111 U. S. 640; *Arrowsmith* v. *Gleason*, 129 U. S. 86."

Where the state court is acting within the limits of its jurisdiction or its officers are enforcing its valid orders or decrees it is recognized that no federal court should impede or avert any action so taken. And the converse is equally true, that no state court should impede or avert proceedings in a federal court having jurisdiction. But where the original court is proceeding without jurisdiction, an entirely different question is presented.

The case of an injunction against acts done by authority of proceedings in a state court after jurisdiction has been transferred by a valid removal to a circuit court of the United States, is a fair illustration of appellant's position. Such proceedings are proceedings in a state court clearly to the same extent as the proceeding here in question. But neither are within the meaning of the statute, for both are without the jurisdiction of the state court. There the jurisdiction has ceased; here the jurisdiction has never existed. The decisions in this class of cases demonstrate that the statute is intended only to prohibit federal interference with state jurisdiction.

In *French* v. *Hay*, 22 Wall. 238, 248, a judgment

was obtained without service of process, the jurisdiction being based upon an unauthorized entry of appearance by an attorney. A suit to annul the judgment was instituted in the state court, and removed to a circuit court of the United States, which proceeded to annul the state court judgment for want of jurisdiction. Meanwhile, however, the judgment creditor undertook to enforce his judgment by suing thereon in another state, which proceeding, upon application of the judgment debtor, the circuit court restrained by perpetual injunction. This court affirmed the decree, held that such an injunction was not within the prohibition of the federal statute, and observed that otherwise, "the result would have shown the existence of a great defect in our federal jurisprudence, and have been a reproach upon the administration of justice" (p. 253).

In *Dietzsch* v. *Huidekoper*, 103 U. S. 494, 497, it was held that proceedings resulting in a judgment in a state court after removal of the cause to a circuit court of the United States were "absolutely null and void"; that a suit to enforce the judgment "was, therefore, but an attempt to enforce a pretended judgment of the state court, rendered in a case over which it had no jurisdiction"; and that a bill filed in the circuit court for the sole purpose of enjoining the so-called proceeding was not demurrable by reason of the statute. A decree *pro confesso* perpetuating a preliminary injunction, which was entered upon the overruling of a demurrer by the defendants, was therefore affirmed, notwithstanding the statute forbidding "a writ of injunction to stay proceedings in a state court."

As was well said by Judge Love in *Wagner* v. *Drake*, 31 Fed. Rep. 849, 851:

> "An injunction in such case by the federal court, restraining the parties before it from proceeding elsewhere, is no injunction, within the spirit and intent of the statute staying proceedings in a state court, because after removal there is no proceeding left in the state court, and no jurisdiction to be interfered with."

If it be said that these cases are distinguishable because section 720 of the Revised Statutes is limited by the Removal Act which forbids a state court to entertain jurisdiction after removal, the answer is that section 720 is also limited by that provision of the Fourteenth Amendment which forbids any state to deprive any person of property without due process of law.

The decisions which hold that replevin or injunction will not lie against an officer in possession of the property of a stranger to the proceeding, at the suit of such stranger, are entirely consistent with the proposition that the property owner may maintain a suit to protect it against any person who assumes to act under void process; for in each case of the former class the process was concededly valid, and the only question was as to the ownership of property affected by it,—a question which must of necessity have been left to the untrammelled discretion of the officer in the first instance, after which the property in his possession must necessarily have come into the possession of the court and the question of its ownership within the court's jurisdiction to determine. But the officer can have no discretion or power whatever to act under avoid process, and a court can take possession only by virtue of

process within its jurisdiction. The cases establishing the doctrine of non-interference with possession under valid process (*e. g.*, *Taylor* v. *Carryl*, 20 How. 583; *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Colbath*, 3 Wall. 334), were reviewed and distinguished in *Kern* v. *Huidekoper*, 103 U. S. 485, 491, 493, and the court, by Mr. Justice Woods, said:

> "After the filing in the United States Circuit Court, on July 27, 1877, of the record of the proceedings in the State court, the latter lost all jurisdiction over the case, and, being without jurisdiction, its subsequent proceedings and judgment were not, as some of the state courts have ruled, simply erroneous, but absolutely void."

In *Gumbel* v. *Pitkin*, 124 U. S. 131, 146, the court recognized this distinction and upheld the power of a state court to disregard the process of a federal court which was void because issued and executed on Sunday, and the right of a state sheriff to levy upon and take possession of property in the hands of a United States marshal thereunder, saying—

> "It was illegal in the marshal to have taken possession of the goods under the writs in his hands issued on Sunday. It was his duty, when the sheriff appeared with a lawful writ from the state court, to surrender possession to him."

Very clearly, this being the marshal's duty, the property could not have been considered in the custody of the court according to the rule preventing interference with such court, for otherwise his plain duty would have been not to surrender possession, except upon order of the court under whose authority he assumed to act, but to resist by force the attempt of the state officer to take the property from him. There was, however, no conflict of

jurisdiction, because there was no jurisdiction on the part of the marshal. There was no clashing of state and federal courts, because no federal court was concerned in the issuance and execution of this void process. In such a case, it should be assumed that the federal courts would not uphold the void process.

Upon similar ground, it has been held that where the case shows an admitted abuse of process, this may be enjoined, though the validity of the judgment upon which it is based be not attacked. Thus, in *Julian* v. *Central Trust Co.*, 115 Fed. Rep. 956, 962, the Circuit Court of Appeals for the fourth circuit sustained an injunction against an admitted abuse of state process by a state officer under valid judgments, and by Judge Simonton said:

> "We do not sit to review these judgments, nor have we the right to do so. The case made shows that Julian, the sheriff, is attempting to sell, for the satisfaction of judgments against the Western North Carolina Railroad Company, property in which that company has no interest or estate whatsoever. He has been enjoined, not from or because of the use of process, but because of the abuse of process. When he seeks to subject the property of the Southern Railway Company, by levying upon it under a judgment to which it was not a party, for the payment of the judgment against the Western North Carolina Railroad Company, he goes outside of his official duty, and becomes a bald trespasser."

Other cases, in which interference by injunction or otherwise have been held improper, are not inconsistent with the position that there can be no interference with jurisdiction where jurisdiction is shown not to exist.

In *Shields* v. *Coleman*, 157 U. S. 168, 182, it was

held that a circuit court of the United States had no right to appoint a receiver with power to take possession of property in the possession of a receiver appointed by a state court. It was objected that the appointment by the state court was void because without jurisdiction, but this court on looking into the record and noticing the provisions of the state law, was constrained to "assume" that the "order was valid" and "authorized by the laws and practice of the state," in the absence of an affirmative showing to the contrary. Manifestly, an opposite conclusion would have resulted had the record certainly shown the appointment to be void for want of jurisdiction.

In *Central Nat. Bank* v. *Stevens*, 169 U. S. 432, it was held that a state court had no power to enjoin certain proceedings in a circuit court of the United States, and it was conceded that the necessity for this rule would not apply in a case of an injunction against a proceeding which might be avoided on account of fraud or a mistake of facts or imposition on the court. The court, by Mr. Justice Shiras, referring to the principle permitting a federal injunction against the enforcement in a state court of a judgment obtained by fraud, said (p. 464):

> "In the present case, no fraud of any kind is imputed to the plaintiffs in the Circuit Court of the United States, nor is it alleged that the action or proceedings in that court were founded in any mistake of facts, or were influenced by any misrepresentation or fraud practised upon the court. But the purpose of this suit was to practically nullify the proceedings in the Circuit Court, and to enjoin the suitors therein from pursuing their

> remedy in that court, not for any fraud of theirs used in promoting their cause, but for the alleged fraud of other parties in another court, and in a case in which these appellants were not parties."

In *Simpson* v. *Ward*, 80 Fed. Rep. 561, application was made to a circuit court for an injunction against a receiver appointed by a state court, on the ground that the appointment was wholly void, the court being without jurisdiction. The application was denied by Judge Lacombe, not because of section 720 of the Revised Statutes, which was referred to, but because there was an adequate remedy at law, it appearing that a denial of an injunction would be followed by no irreparable injury.

So far as a careful examination of the reports has disclosed, it has never been held in any case that an injunction restraining acts of trespass under a concededly void judgment would be equivalent to restraining proceedings in a court.

One of the arguments of the learned Circuit Court of Appeals was that, in order to determine the invalidity of and give relief against a state court order alleged to be void for want of jurisdiction, it would be necessary to exercise an "appellate or revisory jurisdiction over that court" (p. 54). This argument was advanced and fully answered by this court in some of the above cases. In *Johnson* v. *Waters*, 111 U. S. 640, 667, the following statement was made, and in *Marshall* v. *Holmes*, 141 U. S. 589, 599, it was quoted with approval, viz.:

> "In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court."

The fact, if it be a fact, that relief could have been obtained in some state court, does not in the slightest degree affect the right to obtain the same relief in the Circuit Court of the United States where the requisite jurisdictional facts are present, as in the case at bar. Thus, in *Arrowsmith* v. *Gleason*, 129 U. S. 86, 98, upholding the federal power to annul deeds made under authority of a state court order obtained by fraud and imposition, the court, by Mr. Justice Harlan, said:

> "If the case made by the bill is clearly established by proof, it may be assumed that some state court, of superior jurisdiction and equity powers, and having before it all the parties interested, might afford the plaintiff relief of a substantial character. But whether that be so or not, it is difficult to perceive why the Circuit Court is not bound to give relief according to the recognized rules of equity, as administered in the courts of the United States, the plaintiff being a citizen of Nevada, the defendants citizens of Ohio, and the value of the matter in dispute, exclusive of interest and costs being in excess of the amount required for the original jurisdiction of such courts."

It appears, however, that the courts in Kentucky are prohibited by statute (Civil Code, § 285) from enjoining the execution of a judgment of another court of the state, though the judgment be concededly void. *Jacobson* v. *Wernert*, 19 Ky. L. R. 662–663. So that in a case like the one at bar, where an injunction is necessary to prevent irreparable injury, no relief could be had except in a federal court. That the courts of the United States are not bound by such a statute limiting the powers of the state courts cannot be doubted.

Barrow v. *Hunton*, 99 U. S. 80, 82, 83, 85; *Marshall* v. *Holmes*, 141 U. S. 590, 598.

Likewise, an appeal from the order in question would have afforded no relief, for the very statute allowing such appeal provides "that such order shall not be superseded" (Civil Code, § 298). So that even if successful on appeal, the irreparable injury set forth in the bill (pp. 5–6), would have been accomplished and the Association would be without remedy.

The principal argument by which the learned Circuit Court of Appeals supports its decision is based on the assumption that a granting of the relief prayed for would create a conflict of jurisdiction between a state court and a circuit court of the United States, a situation which it was the intention of section 720 of the Revised Statutes to avoid. In this there is a fundamental error, and it lies in an oversight of the simple truth that an injunction against the enforcement of a judgment rendered without jurisdiction is not directed against the exercise of jurisdiction, and therefore cannot possibly involve a conflict of jurisdiction in the true sense. There is no valid pending proceeding in the state court, and, therefore, there is properly no jurisdiction to be interfered with. *Wagner* v. *Drake*, 31 Fed. Rep. 849, 851. It surely cannot be that all possible conflict between state and federal powers must be avoided at any cost. It may well be that the right rule of action in all cases would prevent all conflicts of jurisdiction; but *jurisdiction* must be taken to mean jurisdiction exercised within the limits of *due process of law*, not the exercise of mere physical power under pretended authority of *void process*. It

is fair to assume that courts will not as a rule sanction or uphold a void process; but courts have been known to do this, and in every such case there has been an exercise of mere physical power, not of jurisdiction, and, therefore, there was not a judicial proceeding within the meaning of section 720 of the Revised Statutes. In each of the cases before cited, where void or pretended proceedings in state courts were enjoined or disregarded in the federal courts, there was involved a possible conflict of powers, but in none of them was there involved a conflict of jurisdiction. In the numerous cases of judgments obtained by fraud or through unauthorized appearances and in the *habeas corpus* cases, conflict of powers may exist and is unavoidable. It is true that the jurisdiction is to be exercised with caution; but it is clearly the duty of the court to do so in a case properly presenting the issue. Says the learned Circuit Court of Appeals: "Unless one court or the other shall yield its pretensions, nothing remains but an appeal to force"; and the question is asked: "Which court shall the receiver obey" (p. 61)? This same argument would have applied to many cases sustained by this court; and the answer is obvious. It is not to be supposed that state courts generally will make pretensions involving the enforcement of a void order or judgment; nor is it to be supposed that the state court in this case will not yield its pretensions if the decision of this court shall be in favor of the injunction. In the language of this court in the leading case of *French* v. *Hay*, 22 Wall. 250, 253:

> "If the state courts should persist in proceeding—a thing not to be expected—the wrong

will be on the part of those tribunals and not of the court below."

III.

The questions of fact upon which the agency of the persons served with process may ultimately depend, in view of the positive averments of non-agency in the bill, should be left to a hearing on the merits, particularly in view of the fact that the grounds of the defendant's motion were confined to the effect of section 720 and the amount involved, and there was no suggestion that it appeared that due service had been had in the state court (p. 44). If such a point had been made, the complainant might have adduced additional proof, or amended the bill.

Before analyzing the questions of fact, it will be necessary to consider an objection which, if tenable, would preclude further discussion. This objection may be stated in the language of the Circuit Court of Appeals, as follows (pp. 54–55):

> " Having appeared for the purpose of challenging the jurisdiction of the court, the decision of the court upon that issue is conclusive, until annulled or reversed by some court having jurisdiction to revise and correct error.
>
> However erroneous the conclusions of the Jefferson circuit court may have been, and we intimate nothing in that respect, its judgment is certainly not void, and in a proceeding of this kind we must accept it as a valid and legal judgment, for neither the circuit court nor this court have any character of appellate or revisory jurisdiction over that court. The question is not one of waiver of personal jurisdiction by an appearance solely for the purpose of contesting that jurisdiction, but of the effect and force, in a

> collateral attack, of a judgment upon an issue involving the jurisdiction of the court over the person of a defendant, to which issue the present appellant was a party. The court below was, therefore, right in assuming the validity of the judgment which was the foundation for the subsequent proceedings which led to the injunction here involved."

It will at once occur to the court that in every case of a special appearance for the purpose of contesting the jurisdiction of a court, an issue is necessarily raised as to the existence of a state of facts warranting the exercise of jurisdiction; yet, since the case of *Harkness* v. *Hyde*, 98 U. S. 476, 479, it has been the settled doctrine of this court that a defendant does not waive or lose any right by a special appearance for the purpose of calling the attention of the court to the fact that it is proceeding without jurisdiction. *Mexican Central Ry.* v. *Pinkney*, 149 U. S. 194, 209; *Goldey* v. *Morning News*, 156 U. S. 518, 526. It should be noted that there is no statute or rule of practice in Kentucky to the effect that an appearance for the purpose of objecting to jurisdiction constitutes a voluntary general appearance, as was the case in *York* v. *Texas*, 137 U S. 15, 20, and *Kauffman* v. *Wootters*, 138 U. S. 285, 287.

The rule established by the decisions of the highest court in Kentucky is that a defendant may appear specially for the purpose of challenging the jurisdiction of the person without thereby submitting himself to the jurisdiction of the court. *Sun Mut. Ins. Co.* v. *Crist*, 19 Ky. L. R. 305, 306; *Newport News, etc., Co.* v. *Thomas*, 96 Ky. 613, 615; *Chesapeake, etc., R. Co.* v. *Heath*, 87 Ky. 651, 659; *Maude* v. *Rodes*, 4 Dana, 144, 147.

In this respect, the rule in Kentucky is in accord with the universal rule sanctioned by the decisions of this court. But, in Kentucky, an appeal cannot be taken from an adverse ruling on the question of jurisdiction without entering a general appearance. *Chesapeake, etc., R. Co.* v. *Heath*, and *Maude* v. *Rodes, supra.* In the *Heath* case, *Harkness* v. *Hyde*, 98 U. S. 476, was cited with approval, and the court further said that it was the duty of a defendant having notice of an insufficient service to apprise the court thereof, and that a failure to do so would be "strong presumptive evidence," upon collateral attack, "of the legality of the service." In that case the judgment was reversed on the question raised by the special appearance, and, remanding the case for a new trial, the insufficiency of the service was held to have been waived and a general appearance entered by the appeal. It will thus be seen that a defendant cannot appeal without abandoning the right of challenging the jurisdiction of the court, and that appeal therefore constitutes no remedy in any fair sense.

If there was no waiver by the special appearance, the next question is whether the ruling of the state court in determining its own jurisdiction is conclusive and not subject to attack in a direct proceeding to set aside the judgment or enjoin its enforcement. The authorities fully answer this question in the negative.

Thus in *Rose* v. *Himely*, 4 Cranch, 241, 268, Chief Justice Marshall said :

> "The court pronouncing the sentence, of necessity decided in favor of its jurisdiction, and if the decision was erroneous, that error, it is said, ought to be corrected by the superior

> tribunals of its own country, not by those of a foreign country.
>
> This proposition certainly cannot be admitted in its full extent. A sentence, professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever."

In *Elliott* v. *Peirsol*, 1 Pet. 328, 340, speaking with respect to a collateral attack upon a Kentucky judgment in the Circuit Court of the United States for the district of Kentucky, the court, by Mr. Justice Trimble, said:

> "It is argued, that the Circuit Court of the United States had no authority to question the jurisdiction of the County Court of Woodford county; and that its proceedings were conclusive upon the matter, whether erroneous or not.
>
> We agree, that if the County Court had jurisdiction, its decision would be conclusive. But we cannot yield an assent to the proposition, that the jurisdiction of the County Court could not be questioned, when its proceedings were brought, collaterally, before the Circuit Court. We know nothing in the organization of the Circuit Courts of the Union, which can contradistinguish them from other courts, in this respect.
>
> Where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justifica-

tion; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers."

In *Harris* v. *Hardeman*, 14 How. 334, 341, the court, by Mr. Justice Daniel, quoted with approval from the case of *Starbuck* v. *Murray*, 5 Wend. 148, 158, as follows:

> "For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgment are void, and, therefore, the supposed record is, in truth, no record. If the defendant had not proper notice of, and did not appear to, the original action, all the State courts, with one exception, agree in opinion, that the paper introduced as to him, is no record, but, if he cannot show, even against the pretended record, that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense, by a process of reasoning that, to my mind, is little less than sophistry. The plaintiffs, in effect, declare to the defendant—the paper declared on is a record, because it says you appeared; and you appeared, because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. Unless a court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction."

In *Thompson* v. *Whitman*, 18 Wall. 457, 468, the precise point involved was the right to introduce evidence in a circuit court of the United States to contradict the record of a state court judgment "as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the court," and it was "admitted that no decision

had ever been made on the precise point." But the court was unable to distinguish a case relating to the impeachment of jurisdictional facts "stated to have been passed upon by the court," from those cases in which had been recognized the right to impeach by evidence *aliunde* the record of any judgment on the ground of lack of jurisdiction—citing *Harris* v. *Hardeman*, 14 How. 334, 341; *Elliot* v. *Peirsol*, 1 Pet. 328, 340, and *Rose* v. *Himely*, 4 Cranch, 241, 269.

The cases of *Cooper* v. *Newell*, 173 U. S. 555, 565; *Robb* v. *Vos*, 155 U. S. 13, 38, and *French* v. *Hay*, 22 Wall. 238, 243, 252, establish the right of circuit courts to prevent the execution of a judgment of a state court based upon entry of appearance by an attorney assuming to represent the defendant, but which can be shown to be void by evidence that the attorney acted without authority.

In the *Cooper* case, Mr. Chief Justice Fuller, speaking for the court, cited as a leading case *Thompson* v. *Whitman*, 18 Wall. 457, as establishing—

> "that 'the record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist;' and that 'want of jurisdiction may be shown either as to the subject-matter or the person, or, in proceedings *in rem*, as to the thing.' . . .
>
> The courts of the United States are tribunals of a different sovereignty, and exercise a distinct and independent jurisdiction from that exercised by the state courts, and this is true in respect of the courts of the several States as between each other. And the courts of the United States are

bound to give to the judgment of the state courts the same faith and credit that the courts of one State are bound to give to the judgments of the courts of her sister States.

The same rule applies to each, and the question of jurisdiction is open to inquiry even when the judgment of the court of a State comes under consideration in a court of the United States, sitting in the same State. *Christmas* v. *Russell*, 5 Wall. 290; *Galpin* v. *Page*, 18 Wall. 350; *Pennoyer* v. *Neff*, 95 U. S. 714; *Hart* v. *Sansom*, 110 U. S. 151; *Goldey* v. *Morning News*, 156 U. S. 518."

A striking illustration of the error in holding that the state court's determination in favor of its own jurisdiction is conclusive in the circuit court, is to be found in those cases wherein state courts have assumed to decide that they have not lost jurisdiction by an attempted removal, the removal papers being, however, sufficient according to the view of the federal court. In such a case, the decision of the state court in favor of its jurisdiction is regarded as a usurpation, and, being without jurisdiction, its subsequent proceedings and judgment are not simply erroneous, but wholly void. *Gordon* v. *Longest*, 16 Pet. 97, 104; *Insurance Co.* v. *Dunn*, 19 Wall. 214, 224; *Removal Cases*, 100 U. S. 457, 475; *Railroad Co.* v. *Mississippi*, 102 U. S. 135; *Kern* v. *Huidekoper*, 103 U. S. 485, 492. It is because they are wholly void and not simply erroneous, that they are subject to collateral attack in the federal courts, and, if need be, to injunction. *French* v. *Hay*, 22 Wall. 238, 250, 252; *Dietzsch* v. *Huidekoper*, 103 U. S. 494, 497.

(1.) As to the insurance commissioner, it appeared that he had been appointed agent for service of process

on May 10, 1893 (pp. 34–35), in compliance with section 631 of the Kentucky statutes, which reads as follows:

> "§ 631. Before authority is granted to any foreign insurance company to do business in this State, it must file with the Commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the Commissioner of Insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the Commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this State, in any federal court, it shall be the duty of the Commissioner to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in the State."

The appointment was as follows (pp. 34–35):

> "KNOW ALL MEN BY THESE PRESENTS:
>
> At a meeting of the board of directors of the Mutual Reserve Fund Life Association Insurance Company, of the city of New York, in the state of New York, held in the office of the company in said city, on the 10th day of May, 1893, the following resolution was adopted:
>
> '*Resolved*, That the Mutual Reserve Fund Life Association Insurance Company of the city of New York, in the state of New York, having been admitted or having applied for admission to transact business in the state of Kentucky, in conformity with the laws thereof, does hereby

consent that service of process upon any and every agent that is now or may hereafter be acting for said company in Kentucky, or upon the insurance commissioner of said state, shall be valid service upon said company in any action or special proceedings against said company in the state of Kentucky subject to and in accordance with all the provisions of the statutes and laws of said state of Kentucky, now in force, and such other acts as may be hereafter passed amendatory thereof and supplementary thereto. And said agent, or said insurance commissioner, are hereby duly authorized and empowered to acknowledge service or process for and in behalf of said company in the state of Kentucky, in all cases as provided for by the laws of the state of Kentucky, and service of process, mesne or final, upon said agent, or said insurance commissioner, shall be taken and held to be as valid as if served upon said company, according to the laws of this or any other state, hereby waiving all claims or writ of error by reason of such acknowledgment or service; and service of process upon such agents, or such insurance commissioner in any county of this state, shall be deemed good and valid, and authorize trial of the cause in the court whence such process issued.'

In witness whereof, the said company has to these presents affixed its corporate seal, and caused the same to be subscribed and attested by the second vice-president and secretary, at the city of New York, in the state of New York, on the 10th day of May, A. D. 1893.

[SEAL.]

HENRY J. REINMUND,
2d Vice-President.

F. T. BRAMAN,
Secretary."

On October 10, 1899, the insurance commissioner, acting under authority conferred upon him by the laws of Kentucky, promulgated an order revoking the

authority of the Association and its agents to do business in the state as follows (p. 35):

> "OFFICE OF INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY.
>
> FRANKFORT, KY., October 10, 1899.
>
> Notice is hereby given that from and after this date, all authority granted by this department to the Mutual Reserve Fund Life Association, of New York, a corporation organized under and existing by authority of the laws of the State of New York, together with all licenses issued by this department to agents of the above named association, is revoked.
>
> (Signed) W. H. STONE,
> Insurance Commissioner."

On the same day notice of this action was given to the Association by the following letter (pp. 35–36):

> "STATE OF KENTUCKY:
> OFFICE OF COMMISSIONER OF INSURANCE,
> FRANKFORT, October 10, 1899.
>
> CHARLES W. CAMP,
> Secretary of the Mutual Reserve Fund
> Life Association, New York City.
>
> DEAR SIR:
>
> I have this day revoked all licenses to agents of your association in this State, as your certificate of authority was not renewed when it expired June last. Your company has no authority now to transact business in Kentucky.
>
> Very truly yours,
> W. H. STONE,
> Insurance Commissioner."

Thereupon, and long prior to the service of the summons in question, the Association withdrew all of its agents from the state, and, at the time of the service in question, had no agent of any kind within the state (pp. 2–4, 18–19). Therefore, the only theory upon which it could be concluded that the insurance commissioner was

an agent of the Association for service of process would be that the authorization which made him such agent continued after the exclusion of the Association from the state, as was held in December, 1900, by the Court of Appeals of Kentucky in *Home Ben. Soc.* v. *Muehl*, 59 S. W. Rep. 520, 521. It is submitted that the authority of the commissioner to represent the Association did not continue after its exclusion from the state. The authority for service on the commissioner was given only as a condition precedent to the transaction of business by the Association within the state. The commissioner was not an agent of the Association for any purpose connected with its business, but for this special purpose only. The authority so given rests wholly upon the statute requiring it, and cannot be extended beyond the requirements of the statute. The statute required as a condition of coming into the state for the purpose of doing insurance business that the Association consent to service of process upon the insurance commissioner; but it did not require this appointment of the insurance commissioner to extend to a time when these privileges should be taken away and denied, and by no fair construction can the terms of the statute and the pursuant appointment be so extended, as held in the *Muehl* case. Before the time of the service in question, the privileges and licenses granted to the Association had been revoked by the state, every agent had been withdrawn from the state, and the appointment of the commissioner had been revoked by the Association (pp. 2–4, 18–19). It was bound by the revocation of authority by the state and compelled to withdraw. If this express revocation by the Associa-

tion be not given effect, we have here a situation wherein a foreign corporation is brought within the jurisdiction of a state court by service of process upon a person acting as agent of the corporation by authority of the state alone and not by authority of the corporation, but whose authority the corporation has withdrawn. Such a result would not differ in principle from the case of proceedings against a foreign corporation based upon service of process on one who had never been authorized to represent the corporation within the state. The mere fact that the state court, in a case decided after the appointment, has held that the agency continued, does not affect the right or duty of the federal court to determine whether the corporation was or was not actually served within the jurisdiction. Otherwise, the state courts could in such cases determine conclusively their own jurisdiction under the pretence of construing a statute. *Swann* v. *Mutual Res. Fund L. Assn.*, 100 Fed. Rep. 922, 925, 928; *Friedmann* v. *Empire L. Ins. Co.*, 101 Fed. Rep. 535, 536-539; *Mutual Res. Fund L. Assn.* v. *Boyer*, 62 Kan. 31, 37-42; *St. Clair* v. *Cox*, 106 U. S. 350, 353.

The inquiry whether a state court acquires jurisdiction of the person of the defendant is essentially a federal question, upon which the decision of a state court is clearly not conclusive (*Pennoyer* v. *Neff*, 95 U. S. 714, 733; *Connecticut Mut. L. Ins. Co.* v. *Spratley*, 172 U. S. 602, 609), any more than it would be in the case of the construction of a contract created by statute.

(2.) As to the agency of Frese, it was shown by uncontradicted allegation and affidavit that Frese was not and never had been an agent of the Association for

any purpose (pp. 3, 18–19, 33–36). It was also shown that the authority of every agent of the Association in Kentucky, including Frese, was revoked long prior to the service in question (pp. 18, 33–36). Indeed, this was affirmatively and positively shown by Phelps himself in his so-called amended and supplemental petition upon which the order of receivership was predicated (p. 24). This showing was made by Phelps in connection with an allegation of fraud which the Association never had an opportunity to meet. Evidently realizing that there was nothing in the record of the proceedings before the state court to contradict its positive showing as to the non-agency of Frese and the insurance commissioner, Phelps alleged for the first time in his so-called amended and supplemental petition that the withdrawal of the Association from the state and the revocation of authority of all its agents were acts done pursuant to a scheme to defraud its policyholders (pp. 24–25). Immediately upon the filing of this anomalous paper, the obnoxious order was made. Had such an allegation been before the state court on the motion to quash, and had the court found as a fact upon evidence that the withdrawal of the Association and its agents from the state was a mere fraudulent pretense and that the agencies still existed, there would be reason for holding that the determination of the state court as to the agency was not at least a usurpation of jurisdiction. But there was nothing of the kind. The Association was condemned unheard when the receivership order was entered. The same positive showing of non-agency was made before the Circuit Court by the Association in its bill, and no counter-showing of

any fraudulent scheme to render the withdrawal and revocation unavailing was attempted by Phelps or his receiver, but, abandoning this position, they saw fit to take such steps as to establish the truth of the averments of the bill. They confined their motion to the point of jurisdiction and conceded the facts. The reason for this is not far to seek. There was no gainsaying the insurance commissioner's own certificate showing that the reason for the Association's withdrawal was its exclusion by the state, and the reason for the revocation of authority of agents was the revocation of their licenses by the state (pp. 35–36). Surely, it was justifiable to revoke the authority of agents who could no longer do any business for the Association without violating the laws of the state. The only pretence that Frese had ever been its agent was in the fact that he countersigned receipts for assessments which could only properly be done by a local treasurer (p. 20). But the explanation of this was clearly shown. He was cashier of the Western Bank of Louisville, which had been appointed local treasurer for the sole purpose of transmitting money, and the receipts were countersigned by the bank through him, its cashier (pp. 34, 36). Certainly such a signing of receipts could not be any evidence of his agency; although, had service been made on the bank, a different question might have arisen. The service upon Frese, therefore, was no more binding on the Association than if no process whatever had been served upon any one, and all of the subsequent proceedings based thereon were *coram non judice*, within the cases before cited.

There is nothing in the case of *Connecticut Mut. L. Ins. Co.* v. *Spratley*, 172 U. S. 602, which militates against this position. That was a case of service upon an admitted agent of a foreign insurance corporation while he was within the state engaged in the business of the company, and it was held that this was binding on the corporation, although it had ceased to solicit new business in the state, and had previously withdrawn its agents therefrom.

But aside from the question of agency and the conclusiveness of the decision thereof by the state court, the receivership order made without notice to the defendant was void for want of jurisdiction, because such appointment could only be made *pendente lite*, and no action was pending when the appointment was made. The precise question of the right to appoint a receiver in execution of a final judgment without again bringing the judgment debtor into court has never been before the Kentucky Court of Appeals, probably for the reason that the question is governed by statutory provisions which are too plain to admit of serious question. The authority to appoint receivers is contained in sections 298 and 218 of the Civil Code. The provision of section 298 is that a receiver may be appointed in certain cases "to take charge of the property or fund during the pendency of the action"; and section 218 provides that "the court in which the action is pending" may appoint a receiver to take charge of attached property. This language is too clear for comment. The words "during the pendency of the action" and "in which the action is pending" cannot by any possibility be made to mean "after final judgment." There was not, nor could there

be, any pretense of authority to appoint a receiver in aid of the ordinary writ of *fieri facias* under section 1650 of the Kentucky Statute in execution of a money judgment. The learned court below ruled, however, that the receivership was a case of an "equitable attachment" as authorized by sections 439 and 441 of the Civil Code after a return *nulla bona* of a writ of execution, this being the only method of reaching equitable assets such as in the case at bar in execution of a judgment in Kentucky. *Davidson* v. *Simmons*, 11 Bush, 330, 333. But a simple inspection of these sections shows the error of this ruling. No mention is therein made of a receiver, and, even if it be true that an authority to attach embraces authority to appoint a receiver, the attachment here authorized is only in case an action has been instituted for that purpose. Section 439 provides that the judgment creditor, after return of execution *nulla bona*, "may *institute an equitable action* for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the judgment"; and section 441 provides that, "*in such action* the plaintiff may have an attachment." Moreover, the learned court seems to have overlooked section 70 of the civil code, which requires the action authorized by section 439 to be brought by summons as a requisite to jurisdiction (*Caldwell* v. *Deposit Bank of Eminence*, 58 S. W. 589, 590; *McCallister's Adm'r* v. *Savings Bank*, 80 Ky. 684, 685–686); and also section 39, which prescribes that an action cannot be commenced without "causing a summons to be issued, or a warning order to be made thereon." Any

proceeding without such summons or warning order whenever required, such as an attachment under section 218, is utterly void for want of jurisdiction. *Brownfield* v. *Dyer*, 7 Bush. 505, 508; *Hall* v. *Crogan*, 78 Ky. 11; *Kelly* v. *Stanley*, 86 Ky. 240; *Redwine* v. *Underwood*, 101 Ky. 191.

If it be argued that the action of the state court in entertaining the application for a receiver in execution of the judgment amounted in effect to a reopening of the case in which jurisdiction had been previously acquired, the answer is that the state court had no power under the law of its creation to set aside the judgment and reopen the case, inasmuch as more than sixty days had elapsed since its rendition without any proceedings having been taken for its vacation (p. 22). The Circuit Court of Jefferson County, in which these proceedings occurred, has no stated terms like the ordinary Circuit Courts, but is one of the courts known as "Circuit Courts having Continuous Sessions" (Ky. Sts. 1899, § 965), as to which it is provided that "The Court shall have control over its judgments for sixty days, as Circuit Courts have over their judgments during the term in which they are rendered" (§ 988). The effect of this provision is equivalent to fixing a term during which each judgment is rendered 60 days before its close, and limits the power of the court to reopen the judgment for further litigation to that period. *Louisville, etc., Lime Co.* v. *Kerr*, 78 Ky. 12. At the end of the term at which a judgment is rendered, except as to a proceeding taken during the term, all power of the court to reopen the case ceases, and thereafter the judgment can be set aside only by the institution of a

new suit attacking it for inherent invalidity. The court which rendered the judgment has then no more control over the case, for the purpose of further litigation, than it would have over a case in another court. All it can do, aside from the correction of mere clerical errors, or as expressly empowered by statute, is to issue such process for the execution and satisfaction of the judgment as the law provides. Any action in such a case, which necessarily amounts to or requires a reopening of the case, taken without notice to the party injuriously affected thereby, is *coram non judice* and utterly void. These are fundamental principles of universal application, which have received the sanction of this court and of the highest court of Kentucky. When Phelps offered his "amended and supplemental petition" 60 days after the rendition of the judgment, there was presented the precise question so often passed upon by this court in cases of petitions for rehearing at a succeeding term to that of the decision, and the learned state court might well have decided, in the language of Chief Justice Waite in *Brooks* v. *Railroad Co.*, 102 U. S. 107, where, denying a rehearing, it was said:

> "At the end of the term the parties are discharged from further attendance on all causes decided and we have no power to bring them back."

In *Müller* v. *Ehlers*, 91 U. S. 249, 250, declining to consider a bill of exceptions signed and filed at a term succeeding the judgment, the court said:

> "Upon the adjournment for the term, the parties were out of court, and the litigation there was at an end. The plaintiff was dis-

> charged from further attendance; and all proceedings thereafter, in his absence and without his consent, were *coram non judice*. The order of the court, therefore, made at the next term, directing that the bill of exceptions be filed in the cause as of the date of the trial, was a nullity."

In *City of Manning* v. *German Ins. Co.*, 107 Fed. Rep. 52, the Circuit Court of Appeals, eighth circuit, while recognizing the rule that, ordinarily, the granting of a new trial is discretionary and therefore cannot be reviewed, nevertheless reversed such an order upon a motion made at a term succeeding the judgment, and, by Judge Sanborn, said (p. 56):

> "The result was that the term ended. The control of the circuit court over its judgment ceased. The successful party was discharged from further attendance and all the subsequent proceedings without his consent were *coram non judice* and void."

In *Elder* v. *Richmond, etc., Min. Co.*, 58 Fed. Rep. 536, a state court had set aside its judgment and rendered another after the expiration of a period fixed by statute, as in the case at bar, during which the court retained control over its judgments. The Circuit Court of Appeals, eighth circuit, affirmed a decree of a circuit court of the United States granting equitable relief against the latter judgment, because, as Judge Caldwell said (p. 540):

> "The action of the court . . . was not merely erroneous, but was absolutely void for want of jurisdiction. . . . It could neither vacate the first judgment nor render a new one. The judgment of every court acting without jurisdiction is a nullity, and will be so held and treated in all courts in which it is sought to be used or relied on as a valid judgment."

In *Van Dorn* v. *Pennsylvania R. Co.*, 93 Fed. Rep. 260, 261, the Circuit Court of Appeals, third circuit, ruled that the court below under the state laws had no power to reopen a judgment and permit an amendment to be filed at an ensuing term, and, by Judge Bradford, said (p. 271):

> "We have no doubt that the court below had power to grant the application to amend and should have granted it, if made at the proper time. . . . The granting of it would have involved the opening of the judgment on the demurrer. The term during which that judgment was rendered had theretofore expired and the court below was consequently powerless to allow the proposed amendment."

See also *Sibbald* v. *United States*, 12 Pet. 488, 492; *Bronson* v. *Schulten*, 104 U. S. 410, 415; *Phillips* v. *Negley*, 117 U. S. 665, 672; *Hickman* v. *Ft. Scott*, 141 U. S. 415, 418; *Morgan's, etc., S. S. Co.* v. *Texas, etc., Ry. Co.*, 32 Fed. Rep. 525, 530; *McGregor* v. *Vermont L. & T. Co.* (C. C. A., 9th circuit), 104 Fed. Rep. 709, 710; *United States* v. *1,621 Pounds of Fur Clippings* (C. C. A., 2nd circuit), 106 Fed. Rep. 161, 163; *Reynolds* v. *Manhattan Trust Co.* (C. C. A., 8th circuit), 109 Fed. Rep. 97, 98.

So, in Kentucky, the decisions of the Court of Appeals leave no room for doubt that the filing of amended or other pleadings after judgment necessarily requires reopening the case and setting aside the judgment; that otherwise, they are wholly ineffectual for any purpose (*Brown* v. *Vancleave*, 86 Ky. 381; *Meadows* v. *Goff*, 90 Ky. 540); and that, after the term, the court is without power to set aside the judgment or reopen the case, except as permitted by statute. The statute con-

trolling this point expressly declares that "The court in which a judgment has been rendered shall have power after the expiration of the term, to vacate or modify it" for the reasons specified (Civil Code, § 518). Ten grounds are named. The first three grounds may be acted on without notice, namely: A motion for a new trial, which must have been made during the term and within three days of the judgment (§ 342); an application of a defendant constructively served (§ 414), and "misprisions of the clerk" (§ 518). All the other grounds require the institution of a new suit "by petition" and "on the petition the proceedings shall be the same as those in the action in which the judgment was rendered" (§ 520). That the power in question does not exist except as exercised in accordance with this statute, has long been settled law in Kentucky.

In *Anderson* v. *Anderson*, 18 B. Mon. 95, 98, the court, by Judge Stites, said:

> "The circuit court cannot, after the expiration of the term at which a final order or judgment is entered, vacate, modify or reverse such judgment or order, except upon the grounds enumerated in section 579 [now sec. 518]."

To the same effect are *Hocker* v. *Gentry*, 3 Met. 463, 469; *Scott* v. *Scott's Ex'r*, 9 Bush. 174, 176; *Coffey* v. *Proctor Coal Co.*, 14 Ky. L. R. 415, 416; *Louisville, etc., Lime Co.* v. *Kerr*, 78 Ky. 12, 14; *Maddox's Ex'r* v. *Williams*, 87 Ky. 147.

In *Louisville, etc., Lime Co.* v. *Kerr*, 78 Ky. 12, was considered a statute relating to the power of the Jefferson Court of Common Pleas for sixty days after its judgments, which statute, as afterwards made applicable to

the Circuit Court of Jefferson County, is the statute here in question (Ky. Sts. 1899, §§ 965, 988). Holding that the trial court had no power to grant a new trial upon a motion made after the expiration of the sixty days, the court, by Judge Coper, said (p. 14):

> "It is true, the Court, having power over its judgments and orders during the term, or, in the case of the Jefferson Court of Common Pleas, for sixty days, has power within that time to set aside an order overruling a motion for a new trial; but that power of the Court cannot be extended beyond the period limited by the mere entry within the time of a motion to set aside the order refusing a new trial. Such practice is not only unauthorized by anything in the Code or in the act relating to the Common Pleas Court, but is contrary to the recognized rules of practice prior to the Code, and would be calculated to seriously embarrass both courts and litigants. If the courts have power to entertain such motions, it would seem to follow that parties have a right to make them, and to concede this is to render litigation practically interminable.
>
> There is no authority for a motion to rehear a motion for a new trial, and consequently such a motion cannot enlarge the period during which the Court has power over its orders, and *the order granting a new trial was void.*"

Under the law administered in Kentucky, according to its Court of Appeals, a judgment which is void is binding upon nobody and may be resisted anywhere, not only in the court in which it was rendered and on appeal therefrom but collaterally in any court of general jurisdiction. *Spencer* v. *Parsons*, 89 Ky. 577, 580; *Stevens* v. *Deering*, 10 Ky. L. R. 393, 394. Although, in Kentucky, contrary to the

general rule, an execution of a void judgment by a state court other than that wherein the judgment was rendered is forbidden by statute. *Jacobson* v. *Wernert*, 19 Ky. L. R. 662–663.

There is nothing inharmonious with these principles in the cases cited by the learned Circuit Court of Appeals to the effect that jurisdiction of a court continues until its judgment is satisfied (*e. g.*, *Wayman* v. *Southard*, 10 Wheat. 1; *Riggs* v. *Johnson County*, 6 Wall. 166, 187, 197; *Covell* v. *Heyman*, 111 U. S. 176, 183; *Rio Grande R. Co.* v. *Gomila*, 132 U. S. 478, 483), and that the state court's determination of the form of procedure not involving a question of jurisdiction is conclusive, *e. g.*, *Cornett* v. *Williams*, 20 Wall. 226, 250; *Laing* v. *Rigney*, 160 U. S. 531. See *Hekking* v. *Pfaff*, 82 Fed. Rep. 403, 404; *Lynde* v. *Lynde*, 181 U. S. 183, 186; *Fish* v. *Smith*, 73 Conn. 377, 391. The power of a court to execute its judgment is a very different thing from that jurisdiction of the person which is essential to litigation. Execution of a money judgment requires no jurisdiction of the person of the judgment debtor—it presupposes no right to be heard. And the determination of a lower state court as to its own jurisdiction, in plain conflict with the law as laid down in its statutes and as declared by its highest court, certainly cannot be accepted as due process of law. Inasmuch, therefore, as a final judgment in Kentucky cannot be executed by means of a receivership without the institution of a new suit, which presupposes a jurisdiction of the person and the right to be heard, the order of receivership in this case was clearly void for want of jurisdiction, irrespective of the validity of the original judgment.

Conclusion.

It is, therefore, submitted that the judgment appealed from should be reversed, on the ground that the Circuit Court had jurisdiction to grant the relief prayed for, and remanded with instructions that the complainant be accorded further hearing on the demurrer or otherwise in conformity with the practice in equity.

Washington, April 14, 1903.

William D. Guthrie,
Edmund F. Trabue,
George Burnham, Jr.,
Sewell T. Tyng,
Of counsel for appellant.

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1902.

NO. 263.

Office Supreme Court U. S.
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APR 24 1903
JAMES H. McKENNEY,
Clerk.

MUTUAL RESERVE FUND LIFE ASSOCIATION,
Appellant,

against

JAMES S. PHELPS and FIDELITY TRUST AND SAFETY VAULT COMPANY.

Appeal from the Circuit Court of Appeals for the Sixth Circuit.

REPLY BRIEF FOR APPELLANT.

WILLIAM D. GUTHRIE,
EDMUND F. TRABUE,
GEORGE BURNHAM, JR.,
SEWELL T. TYNG,
Of counsel for appellant.

WASHINGTON, APRIL 24, 1903.

[18,437.]

[18,437.]

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 263.

MUTUAL RESERVE FUND LIFE ASSOCIATION, *Appellant*,

AGAINST

JAMES S. PHELPS and FIDELITY TRUST AND SAFETY VAULT COMPANY.

Appeal from the Circuit Court of Appeals for the Sixth Circuit.

REPLY BRIEF FOR APPELLANT.

I.

Most of the argument of the learned counsel for the appellees is devoted to the merits on the questions of multiplicity of suits, trust fund, etc., and to the efficacy of the proceedings in the state court, notwithstanding that the positive averments of the bill as to want of jurisdiction of the state court are admitted by the motion to dismiss for want of jurisdiction. As Mr. Justice White said in *Howard* v. *De Cordova*, 177 U. S. 609, 614:

> "Besides this decisive consideration, the proceedings in the state court, whatever may have been their efficacy as a defense to the charges of fraud contained

> in the bill, as to which we express no opinion, were not adequate to defeat the jurisdiction of the Circuit Court of the United States. In other words, they address themselves not to the jurisdiction of the court, but to the merits of the cause. *Huntington* v. *Laidley*, 176 U. S., 668."

So also in *Illinois Central R. R. Co.* v. *Adams*, 180 U. S. 28, 40, Mr. Justice Brown said :

> "In passing upon these questions we wish it to be distinctly understood that we express no opinion in this case except upon the jurisdiction of the Circuit Court to entertain this bill, and its authority to pass upon the several defenses set up in response thereto. We do not say that the court may not ultimately come to a conclusion to dismiss the bill upon its own allegations, if the several questions be raised by demurrer; but we do not think it was proper to dispose of them by motion to dismiss for want of jurisdiction. The difficulty we find in the case is that the defendant has confused that which is jurisdictional with that which is not, and has attempted to forestall the ultimate action of the court by attacking its jurisdiction upon propositions which belong to the merits."

It is true that the appellees' brief (at p. 7) asserts that the Circuit Court "overruled said demurrer and plea;" but this must be an inadvertent mistake, for the record does not show it. So also it is said in appellees' brief that the motion to dissolve the injunction was made "upon the same grounds as relied upon in their demurrer and plea to the jurisdiction of the court," at page 8; but the perusal of the record will show that the third ground of demurrer, namely, to the

merits (p. 42), was not contained either in the motion to dissolve (p. 44) or in the assignment of errors in the Circuit Court of Appeals (p. 45). At any rate, no such practice as dismissing a bill on motion has ever been sanctioned by this court.

II.

It is proper to mention that there is absolutely nothing in the record to sustain many statements in the appellees' brief—*e. g.*, that the receiver "took possession of the assets" (see p. 6 and pp. 55–56). This is not only inaccurate but quite inconsistent with the following concession in the brief (at p. 27):

> "At the time of filing its bill of complaint in the U. S. Circuit Court the receiver had collected no money belonging to the Association or in any way prejudiced its rights."

This appeal does not present the case of a state court actually in possession of property sought to be disturbed or interfered with by a federal court, and therefore the authorities which hold that possession ought not to be interfered with are not in point. Actual possession presents different considerations than mere threatened trespasses under color of a void order or judgment. Indeed, possession under a *void* order would not be a defence. *Gumbel* v. *Pitkin*, 124 U. S. 131, 146.

III.

As to the proceeding for the appointment of the receiver, the question is not what is proper practice in the federal courts or in other States, but whether, *under the laws of Ken-*

tucky and in the very teeth of its Code, a receiver can be appointed without the institution of a new suit, the issue of a summons or warning order, and an opportunity to be heard. The matter is not of form, but of substantive right. Are we entitled to a day in court? In Kentucky, no receiver can be appointed after judgment except upon a new suit in the nature of a creditor's bill. The Code provisions and authorities cited in the original brief establish this conclusively (pp. 42–43).

The cases of *Wells* v. *Deposit Bank, 18 Ky. L. R. 156, and Caldwell* v. *Same, 22 Ibid. 684*, relied on by appellees, have no application. They were not cases where an action at law was instituted, but both controversies arose out of an action to *settle the estate* of W. T. Hardin, deceased. Such an action is governed by *Sec. 428 and next succeeding sections, Civil Code*, which require a *settlement* of the decedent's estate, and an adjudication *of all claims whatever* against it. *Sec. 436* even provides for an injunction *against the prosecution of any other actions.* The judgment for the bank, upon which *fi. fa.* was issued and returned *nulla bona*, was obtained upon a claim asserted by the bank against decedent *in the settlement suit.* When the *fi. fa.* was returned *nulla bona*, the bank was not at liberty to institute an independent suit *under Sec. 439*, but was required to litigate every claim it had in the settlement suit, the last suit which could ever be brought against the decedent's representatives.

The question now presented was not raised in the settlement suit, and no objection was made to the supplemental petition filed in said suit after the return of *nulla bona*, and as the bank's supplemental petition was dismissed, *no adjudication was made in favor of* such a proceeding.

But had the question been raised and the proceeding been upheld, the decision would have been no precedent in the present case, because the suit in which the supplemental petition was filed *was a pending suit;* there had been no final judgment disposing of it; and the claim which was set up by the supplemental petition was, as was every other claim against the decedent's estate, properly cognizable in that suit. Indeed, it could not be tried in any subsequent suit, for that suit was the last permissible. The cases, therefore, are not relevant.

IV.

Upon the question whether or not an appointment of a state officer by a foreign corporation as agent for service of process, pursuant to a statute requiring it as a condition to entering the State, continues in effect after withdrawal or exclusion of the corporation from the State, the case of *Forrest* v. *Pittsburgh Bridge Co.*, 116 Fed., 357, 359, Circuit Court of Appeals, seventh circuit, expressly holds that such authority ceases with the withdrawal. To the same effect are *Mutual Reserve Fund L. Ass'n* v. *Boyer*, 62 Kansas 31, 39; *Millan* v. *Mutual Reserve Fund L. Ass'n*, 103 Fed. Rep. 764, 770, following *Swann* v. *Mutual Reserve Fund L. Ass'n*, 100 Fed. Rep. 922, and *Friedman* v. *Empire L. Ins. Co.*, 101 Fed. Rep. 535. In *People* v. *Commercial Alliance L. Ins. Co.*, 7 N. Y. App. Div. 297, 299, the New York court unanimously held that service upon an insurance commissioner after cessation of business in the State would not sustain a judgment entered thereon against the corporation. The case of *Pervanger* v. *Union Casualty & Surety Co.*, 32 So.

Rep. 999 (Sup. Ct., Miss.), apparently is to the contrary. *Magoffin* v. *Mutual Reserve Fund L. Ass'n*, 91 N. W. Rep. 1115 (Sup. Ct., Minn.), is clearly distinguishable, because in that case the Minnesota statute expressly provided that the appointment should be irrevocable, "so long as any liability of the company remains outstanding" in the State. So, also, in *Collier* v. *Mutual Reserve Fund L. Ass'n*, 119 Fed. Rep., 617, 618, the Arkansas statute expressly provided that the stipulation for service could not be revoked "so long as any liability of the stipulating company to any resident of this State continues." No such provision is contained in the Kentucky statute before the court.

The case of *Henrietta Mining and Milling Co.* v. *Johnson*, 173 U. S. 221, is not in point, because there it clearly appeared that service was made within the jurisdiction upon a general manager of the company, and the only point involved was whether or not a statutory provision for service upon one class of agents was exclusive.

As to the right of the federal court to judge for itself upon the sufficiency of service to meet the constitutional requirement of due process, see also *McCord Lumber Co.* v. *Doyle*, 97 Fed. Rep. 22, 23; *Moredock* v. *Kirby*, 118 Fed. Rep. 180; *Cady* v. *Associated Colonies*, 119 Fed. Rep. 420, 424. Indeed, the cases of *St. Clair* v. *Cox*, 106 U. S. 350, 355, and *Conn. Mutual L. Ins. Co.* v. *Spratley*, 172 U. S. 602, 617, recognize that this is essentially a question for the federal courts to determine for themselves—that is, whether or not the defendant corporation was actually served within the constitutional requirement of due process. See also *Williamson* v. *Berry*, 8 How. 495, 540.

As to the jurisdiction to enjoin under section 720, R. S., see *National Surety Co.* v. *State Bank*, 120 Fed. Rep. 593, published since the preparation of the original brief.

V.

In Kentucky, all actions at law or in equity are commenced by filing a petition and the issue of summons. A petition commencing a judgment creditor's action in equity would contain the matter set forth in the "amended or supplemental petition" filed in the state court (pp. 23–24). This petition alleges new matter, makes allegations of fraud and prays for equitable relief. The original suit having been at law, the court on the filing of the petition had to transfer the action to the equity docket (p. 22). Such petition so seeking equitable relief averred the recovery of a judgment "in the sum of two thousand three hundred and sixty dollars ($2,360), with interest from May 19, 1900" (p. 23). Although no summons was issued and no opportunity whatever given to the defendant Association to meet the allegations of fraud, a receiver was appointed. Even if the statute of Kentucky sanctioned relief against an absent and unheard defendant without notice or summons, it is submitted that the nature of the proceeding would not be changed: it would remain essentially a judgment creditor's suit in equity, for it has all the elements of such a suit. *Barrow* v. *Hunton*, 99 U. S. 80, 85; *Bondurant* v. *Watson*, 103 U. S. 281, 286; *Marshall* v. *Holmes*, 141 U. S. 589, 598. And as was said by Mr. Justice Bradley in *Barrow* v. *Hunton*, *supra*, quoted with approval in *Marshall* v. *Holmes*:

> "The character of the cases themselves is always open to examination for the purpose of determining whether, *ratione materiæ*, the courts of the United States are incompetent to take jurisdiction thereof. State rules on the subject cannot deprive them of it."

This being so, it is submitted that the "amended and supplemental petition" in which the receiver was appointed was essentially a suit of a civil nature in equity, where the matter in dispute was $2,360 exclusive of interest (p. 23), and presented a controversy between citizens of different States. As such, it was removable under the Judiciary Act of 1875 as amended by the act of August 13, 1888. It is no longer open to question that such a creditor's bill on a judgment of a state court may be filed in a United States Circuit Court. *Mississippi Mills* v. *Cohn*, 150 U. S. 202, 207.

In the case at bar, the bill alleges the proceedings on removal (pp. 6, 27–29). The petition was presented on August 22, 1900, within eighteen days after the filing of the so-called amended petition. A perusal of the petition and bond will show that the requirements of the statute were complied with. Hence any subsequent proceedings in the state court would be absolutely void. *Kern* v. *Huidekoper*, 103 U. S. 485. The fact that at the time the bill of complaint in the present suit was filed—one day after the filing of the petition for removal—the removal record had not yet been filed in the United States Circuit Court was immaterial. *Railroad Co.* v. *Koontz*, 104 U. S. 5, 13; *Steamship Co.* v. *Tugman*, 106 U. S. 118, 122. Indeed, the record may be deemed to have been filed at the same time as the present bill.

If the case was removable, there should be no reasonable doubt of the power of the Circuit Court to enjoin the defendant Phelps and the receiver from further proceeding in the state court within the cases of *French* v. *Hay*, 22 Wall. 238. 248, and *Dietzsch* v. *Huidekoper*, 103 U. S. 494, 497.

WASHINGTON, APRIL 24, 1903.

WILLIAM D. GUTHRIE,
EDMUND F. TRABUE,
GEORGE BURNHAM, JR.,
SEWELL T. TYNG,
Of counsel for appellant.

[18,437.]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

Office Supreme Court U. S.
FILED
MAY 7 1903
JAMES H. McKENNEY,
Clerk.

MUTUAL RESERVE FUND LIFE ASSOCIATION,
Appellant,

vs.

JAMES S. PHELPS and FIDELITY TRUST & SAFETY VAULT COMPANY,
Appellees.

No. 263.

MEMORANDUM IN ANSWER TO APPELLEES' SUPPLEMENTAL PRINTED STATEMENT.

Since the argument, counsel for appellees has submitted a memorandum calling the attention of the court to the case of *Youngstown Bridge Co.* v. *White's Adm'r*, 105 Ky. 273, 283. The case is cited to sustain the proposition that an appeal in the case at bar would not have constituted the equivalent of a general appearance. It is argued that, inasmuch as the Court of Appeals of Kentucky in that case did not, in remanding the case after holding the service of process insufficient to support the judgment, state that the defendant was in court as under a general appearance by reason of the appeal, in accordance with the rule applied in *Chesapeake, etc., R. Co.* v. *Heath's Adm'r*, 87 Ky. 651, 660, the doctrine of the latter case would not have been applicable to the case at bar had the Association appealed from the judgment of the state court and secured a reversal in the appellate court.

There is nothing in the *Youngstown Bridge* case to furnish any basis for such a contention. The point in that case arose upon a proceeding by motion, after judgment by default and at a subsequent term, to set aside the judgment for insufficient service of process and to

quash the return. In the nature of the case, therefore, the appellate court could not remand the case for a new trial; but, upon holding the service insufficient, there was no course open other than that taken, namely, to hold that the motion should have been granted and remand "with directions to set aside the judgment and quash the return." A new trial could not have been awarded in such a proceeding. In the case in the state court now before this court, however, as in the case of *Heath's Adm'r*, an appeal by the Association with success could only have resulted in a new trial. Of course, had the Association not appeared specially at the trial, but subsequently and after final judgment had proceeded by motion to set aside the judgment, a new trial could not have been awarded, and the rule applied in the case of *Heath's Adm'r* would have been inapplicable. That course would have involved such delay as to have rendered any relief when obtained unavailing, since a stay of proceedings on the judgment pending the litigation is in such case expressly forbidden by statute (*Jacobson* v. *Wernert*, 19 Ky. L. R. 662–663).

In *Chesapeake, etc., Ry. Co.* v. *Wilder* (Ky., March 4, 1903), 72 S. W. Rep. 351, the Kentucky rule that an appeal constitutes an entry of general appearance for all the purposes of a new trial after remand, notwithstanding a reversal solely because of insufficient service of process, is again unmistakably reiterated. In delivering the opinion of the court, Hobson, J., said (p. 353):

> "The Louisville & Nashville Railroad Company, although it may have acted as the agent of the defendant in making the contract, is not such an agent as the statute contemplates; and therefore the service of process upon it was invalid, and should have been quashed. But on the re-

turn of the case to the circuit court no further process will be necessary, *as the appeal enters the defendant's appearance to the action.* In 3 Cyc. 510, the rule on this subject is thus stated: 'Taking an appeal or suing out a writ of error from an inferior court to an intermediate appellate court, which tries the same *de novo*, constitutes a general appearance in the intermediate court, and confers jurisdiction of the person on that court, whether the court from which the appeal was taken had acquired jurisdiction of the person or not. If the appeal is to a reviewing court, it is a general appearance, in the sense that on reversal and remand to the trial court the defendant is in court for the purpose of further proceedings without any further steps to bring him into court, even though the judgment was reversed on the ground that the trial court had not acquired jurisdiction of the person of the defendant.' This rule was laid down in 1809 by this court in *Grace* v. *Taylor*, 4 Ky. 430. It was followed in 1815 in *Graves* v. *Hughes*, 7 Ky. 84, and *Wharton* v. *Clay*, 7 Ky. 167; also in 1826 in *Hockaday, etc.*, v. *Commonwealth and Adkins*, 20 Ky. 12. In a number of subsequent cases the rule is adhered to. *Bradford* v. *Gillaspie*, 38 Ky. 67; *Chesapeake, Ohio & Southwest R. R. Co.* v. *Heath's Adm'r*, 87 Ky. 651, 9 S. W. 832; *Thompson* v. *Moore*, 15 S. W. 6, 358; *Lillard* v. *Brannin*, 91 Ky. 511, 16 S. W. 349."

Upon the point that the "amended and supplemental petition" of Phelps in the state court was the institution of a new suit requiring new process, see also, the recent decision in *Hudson* v. *Wood*, 119 Fed. Rep. 764, 772–775, where the present case is discussed.

New York, May 4, 1903.

William D. Guthrie,
Edmund F. Trabue,
George Burnham, Jr.,
Sewell T. Tyng,
Of counsel for appellant.

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SUPREME COURT

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 263.

MUTUAL RESERVE FUND LIFE ASSOCIATION,
Appellant,

against

JAMES S. PHELPS and FIDELITY TRUST AND SAFETY VAULT COMPANY.

Appeal from the Circuit Court of Appeals for the Sixth Circuit.

PETITION FOR A REHEARING.

(18437)

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 263.

MUTUAL RESERVE FUND LIFE ASSOCIATION, *Appellant,*

vs.

JAMES S. PHELPS AND FIDELITY TRUST AND SAFETY VAULT COMPANY, . . *Appellees.*

Notice.

Appellees, James S. Phelps and Fidelity Trust and Safety Vault Company, will take notice that appellant will on Monday, June 1, at the Court Room of the United States Supreme Court at Washington, D. C., file a petition for a rehearing of the decision made in this case on the 18th day of May, A. D. 1903, of which petition a copy is hereto attached.

EDMUND F. TRABUE,
Counsel for Appellant.

Service made on Counsel May 28, 1903.

18437

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 263.

MUTUAL RESERVE FUND LIFE ASSOCIATION, *Appellant*,
vs.
JAMES S. PHELPS AND FIDELITY TRUST & SAFETY VAULT COMPANY, . . *Appellees*.

Appeal from the Circuit Court of Appeals for the Sixth Circuit.

PETITION FOR REHEARING.

After a decision from this court we should not ask a rehearing, however important to ourselves the case decided, if the points involved were not of so general importance.

The decision is confined substantially to two points:

1. That service upon the Insurance Commissioner is effectual for all purposes; and

2. That no summons was necessary in the Receivership proceeding.

The first point is of paramount importance to most foreign insurance companies now doing business in

Kentucky. The Kentucky decisions cited in the opinion, *viz.: Home, etc., of New York v. Muehl, 59 S. W. 520; 22 Ky. L. R. 1378*, and *Germania, etc., Co. v. Ashby, 23 Ky. L. R. 1564*, are very recent and made long since contracts of the insurance companies with the State for accepting service were made, as in the instant case. *E contra, Friedman v. Empire Co., 101 Fed. 535*, opinion by Judge Barr, and *Swann v. Mut. Res. Fund L. A., 100 Fed. 922*, an able opinion by Judge Evans following the decision of Judge Barr, were made prior to the announcement of the Kentucky Court in the Home Benefit case, and many insurance companies have doubtless accepted the statute as construed by those judges.

With great deference we submit that although the Kentucky Appellate Court's construction of the Kentucky Statute would have been controlling had the decision been made before our contract was made, its subsequent decision cannot vary our contract. That the Statute is a part of the contract for service, the State a party to the contract, and that the State cannot vary the contract *ad libitum* by the device of construing the Statute. That when we appeal to this court on the question of due process it will construe the Statute as freely as in cases where it is claimed here that the plaintiff's contract has been impaired by a State Statute. In

such cases this court will not permit the State Court to determine either that there was no contract, or that the offending Statute does not impair it. *Houston &c. Co. v. Texas, 177 U. S. 77; Stearns v. Minn., 179 U. S. 223, etc., etc.*

We submit that the State Court did not construe the Statute, but simply amended it by judicial legislation. The Statute did not provide simply for service in actions brought by *Kentucky policyholders* accepting policies while the company was transacting business in the State, but provided for service "*in any action brought or pending in this State.*" *Ergo*, the Statute, by its terms, would cover any action by any citizen of New York brought in a Kentucky court. The Statute, according to the Kentucky court, would hold the foreign corporation to defend in Kentucky forever. There is no hope of release until the last policyholder die. If the foreign company consented so to be bound only its own folly is blameable, but if the Statute provides no such consent, can the State court require it by misconstruing the Statute, such construction post-dating the contract?

In *Friedman case* Judge Barr found that the alternative confronted him either to confine liability to service to the time of transacting business in Kentucky or to extend it forever, and that such extension was inadmis-

sible under the statute. His review of the statute was painstaking, and his reasoning, as usual, was able.

In *Swann v. Mutual, etc., Assn.* the Court ably demonstrated the injustice to the Association of holding it bound to rely upon receipt from a hostile commissioner, of summons served upon him. To quote from these elaborate opinions would only mar the argument therein contained.

Under the principle lately announced by this Court in *James, U. S. Marshal v. Bowman* (decided May 4, 1903), construing *Secs. 5507* and *5508*, this Court, following the trade-mark cases, *100 U. S. 82*, and Income Tax Case, *158 U. S. 635*, holding that although Congress might have enacted a statute confined to Federal elections which would have been valid nevertheless, as the statute was too broad and applied to elections generally, it was unconstitutional; that the statute could not be made constitutional by so construing it as to limit it to the field to which Congress had the right to limit it, the Kentucky Court should have held *Sec. 631* aforesaid to cover, as the statute declared "any action brought or pending in this State," and should not have attempted to vitalize it by confining it to actions by Kentucky policyholders contracting in Kentucky with the company while transacting business here. The Kentucky Court's decision is in conflict

with the principle announced by this Court in *U. S. v. Bowman.*

Accordingly, with great respect, we submit that this court should apply the principle of *U. S. v. Bowman* to the *instant* case and hold *Sec. 631* to cover, as it provides, "any action brought or pending in this State" (of Kentucky), and accordingly to operate only so long as the Company transacted business in Kentucky.

II.

If, however, the first point be still held against us, we submit, with great deference, that the Receivership proceeding is essentially different from the interpretation thereof in the opinion. This Court says:

> "It was a mere continuation of the action already passed into judgment, and in aid of the execution of such judgment."

If so, it would be appealable or non-appealable, as the amount involved in the original action might determine. Nevertheless, it is the amount in the equitable action upon a return of *nulla bona* upon a *fi. fa.* which determines appellate jurisdiction, *Nashville, &c. Co. v. Mattingly 19 Ky. L. R. 373.* The determination in that case was that the amount involved in the equitable

action determined appellate jurisdiction. Thus it is demonstrated that the equitable action is independent. But this is equally demonstrable from a review of the Statutes involved.

Kentucky practice is statutory. There is no pleading admissible in Kentucky except as provided by the Code of Practice. Under that code no petition or amended petition can be prosecuted without summons, except an amended petition to perfect a cause of action alleged in the petition. Such amended petition is necessarily filed before judgment, and if it state a new cause of action summons is indispensable. Without summons a judgment upon it is void.

After judgment only execution is admissible, no pleading is possible. *Brown v. Van Cleave, 86 Ky. 381; Meadows v. Goff, 90 Ky. 540.* The only execution of a judgment *in personam* is a *fi. fa.; Ky. Stats. Sec. 1650.* Nor is any action upon a judgment admissible except an equitable action authorized by *Sec. 439 Civil Code; Davidson v. Simmons, 11 Bush, 333.*

After *60 days* following a judgment the Court's control over the judgment expires; *Act of Dec. 30, 1892, Sec. 5, p. 419,* providing:

> "The court shall have control over its judgments for sixty days as Circuit Courts have over their judgments during the term in which they are rendered."

It is even held in Kentucky, *Louisville, &c. Co. v. Kerr, 79 Ky. 12,* that the Court after sixty days has no jurisdiction to rehear a motion for a new trial.

See also *Elder v. Richmond, &c. Co., 56 Fed. Rep. 536; Mueller v. Ehlers, 91 U. S. 249, etc.*

As pleadings were inadmissible in the action, nothing was admissible after judgment except execution. The only execution at common law was *fi. fa. Ky. Stats., Sec. 1650;* and the only action "*an equitable action*" under *Sec. 439 Civil Code*, as aforesaid:

> "After an execution of *fieri facias*, directed to the county in which the judgment was rendered, or to the county of the defendant's residence, is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the same, the plaintiff in the execution may institute an equitable action for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the judgment; and in such actions, persons indebted to the defendant, or holding money or property in which he has an interest, or holding evidences or securities for the same, may be also made defendants." *Sec. 439.*
>
> "An action is commenced by filing in the office of the clerk of the proper court a petition stating the plaintiff's cause of action, etc., 'and in either case by causing a summons to be issued or a warning order to be made thereon.'" *Civil Code, Sec. 39.*
>
> "An action upon a return of no property found, pursuant to Section 439, must be brought in the county

in which the judgment is rendered, or in which the defendant resides or is summoned." *Civil Code, Sec. 70.*

"A lien shall be created on the property of the defendant (in action under Section 439) by levy of the attachment, or by service of the summons with the object of the action endorsed thereon on the person holding or controlling his property." *Sec. 442.*

We are consequently, not left to questions of practice, but provided with express statutory requirement absolutely complete, of an "equitable action" to be "instituted" upon a return of *nulla bona* upon a *fi. fa.* It thus appears that the action is to be "instituted," *i. e.*, summons is to be issued. That until summons issued no action is commenced. That an attachment may be procured by *endorsement* upon the *summons.* That the action may be brought in the county wherein the judgment was rendered, or any county where the defendant *resided* or was *summoned.*

Due process is process according to State law, and if statutory, State Statute. This statutory procedure *requires* summons. Procedure, therefore, without summons is denial of due process. *Pennoyer v. Neff, 95 U. S.* When the term ended the judgment became final and defendant was out of court except as to its property liable to levy under a *fi. fa.* It was also liable to be again brought into court in an "equitable action" under Sec. 439, by service of a *summons.* There was

no service and no summons, hence the United States Circuit Judge held the proceedings a nullity.

The *nisi prius* State Judge, after judgment and term ended, accepted the supplemental petition in the form of a petition under Sec. 439 without summons, and immediately appointed a Receiver. He could not handle it in the common law action. He did not even assume so to do. He assumed to transfer it "to the equity docket," *Rec. p. 22.* This was because it was, if anything, a petition *instituting* "an equitable action." If so, summons was indispensable; *Sec. 39.* Until summons is issued an attachment previously issued is void. Any order whatever before summons is void. A sale under an attachment before summons is anullity, and passes no title. *Hall v. Crogan, 78 Ky. 11; Kellar v. Stanley, 86 Ky. 240; Redwine v. Underwood, 101 Ky. 91.* (Even an order upon an amended petition before judgment, asserting a new cause of action, is void. *Cecil v. Sowards, 10 Bush, 96; Cope v. Slayden, 24 Ky. L. R. 1735 (Feb. 24, 1903).*

In *Hall vs. Crogan*, the court, holding an attachment issued before summons *void*, said:

> "The question raised in this case is, can an attachment issue before the summons? We see no escape from the conclusion reached by the court below.

"The plaintiff may, at or after the commencement of an action, have an attachment, and not before. An action is commenced by filing in the clerk's office the petition and causing a summons to be issued or a warning order made. (Secs. 39, 194, Civil Code.) There is no *lis pendens* until a summons is issued or a warning order made, and the provisions of the General Statutes are not in conflict with this view of the case; and if such were the case, the provisions of the code of practice must control."

In *Kellar v. Stanley*, the court said:

"It seems to us the paper issued by the Clerk in this instance as a summons can not be regarded as such, but is fatally defective.

"As, therefore, there was neither a summons nor warning order against the defendants when the attachment was issued, it must, in obedience to the clear requirements of the Code, and following the case of *Hall vs. Crogan*, be held void. And being so, the Court had no jurisdiction of the subject of the action, and the judgment and sale under it of the lot in question conferred no title apon Fillion, the vendor of appellants."

The device of assumption to transfer to equity was a farce. The Statute provides only for transfer before judgment; *Civil Code, Sec. 10.* The transfer is on motion of defendant *when* or *before* he answers; *Sub-Sec. 2*, or by the court before judgment, *Sub-Sec. 3*, as follows:

"2. The defendant, by motion made when or before he answers, may have an ordinary action transferred to the equity docket, if, according to the provisions of section six, it should have been an equitable action.

"3. The court may, without motion, order the transfer of an action from one docket to another if either party be entitled to such transfer; or may try the action, or render judgment therein by default, unless a party entitled to a transfer move therefor."

Appellee Phelps was therefore confronted with this dilemma, that the statute provided for transfer to equity before judgment, and nevertheless judgment had been rendered at a previous term. That an equitable action under *Sec. 439* could not be commenced without issuing summons. This was the State of Kentucky law. The statutes are unquestionable.

Wells v. Deposit Bank, 18 Ky. L. R. 156, and *Caldwell v. Same, 22 Ky. L. R. 684*, cited in the opinion, are distinguishable by reference to *Sec. 428, Ky. Code*. Those cases sprung out of incidental controversies arising in the settlement of a decedent's estate. The claims involved were not susceptible of prosecution in separate actions. By *Sec. 436* an injunction against the prosecution of any other action was provided. The judgment upon which the *fi. fa.* was returned *nulla bona* was rendered *against decedent in the settlement suit*. The claimant was not at liberty to institute an independent suit under *Sec. 439*, but required to litigate his claim in the settlement suit, so that the decedent's estate might be settled. The question now presented was not raised, and as the bank's

petition was dismissed there was no adjudication in favor of such a proceeding; *e contra*, any question raised by the bank would have been considered as determined against it.

It is submitted that *Laing v. Rigney, 160 U. S. 531*, is distinguishable. The question of necessity of a subpoena upon a supplemental bill in that case was a question of fact determinable by New Jersey practice. Defendant introduced expert testimony and prevailed in New York courts. This court reversed the *finding of fact*, determining simply that no subpoena was necessary under New Jersey practice. The supplemental bill in the New Jersey case was filed before decree. As defendant was in court by service of subpoena on the original bill the question involved was simply a question of State practice. If that practice required defendant to take notice of every supplemental petition he was bound to do so. The question would have been decided differently in Kentucky: *Cecil v. Sowards and Cope v. Slayden, supra.*

With great deference we submit this petition.

EDMUND F. TRABUE,

Of Counsel.

CERTIFICATE.

Edmund F. Trabue certifies that he is of counsel for appellant in this case and that in his opinion this petition is well founded in point of law, and further certifies that it is not filed or interposed for delay.

EDMUND F. TRABUE.

No. 263.

Office Supreme Court U. S.
FILED
APR 23 1903
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1902.

MUTUAL RESERVE FUND LIFE ASSOCIATION, . . . *Appellant*,

VERSUS

JAMES S. PHELPS AND THE FIDELITY TRUST & SAFETY VAULT CO., ... *Appellees*.

Brief of Appellees on Appeal from the United States Circuit Court of Appeals, Sixth Circuit.

BENJAMIN F. WASHER,
Counsel for Appellees.

FREDERICK FORCHT,
WILLIAM H. FIELD,
NORTON L. GOLDSMITH,
Of Counsel.

JOHN P. MORTON & COMPANY, PRINTERS, LOUISVILLE.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1902.

MUTUAL RESERVE FUND LIFE ASSOCIATION, - - - - - - *Appellant*,

No. 263. VERSUS

JAMES S. PHELPS AND THE FIDELITY TRUST & SAFETY VAULT CO., - *Appellees*.

Brief of Appellees on Appeal from the United States Circuit Court of Appeals, Sixth Circuit.

Statement of the Case.

The opinion of the Circuit Court of Appeals, Sixth Circuit, Judge Lurton writing, contains a complete statement of the facts of this case, as well as an exhaustive review of the law. (Record and 112 Fed. Rep., p. 453.)

The salient features of this appeal will be found to be as follows:

On February 28, 1900, the appellant, James S. Phelps, filed a petition in the Jefferson Circuit Court, a court of general jurisdiction established and existing as one of the several circuit courts of the State of Kentucky. In said petition the appellant here, The Mutual Reserve Fund Life Association, was made defendant. The petition and its prayer sought to recover from the defendant $1,994.20, with interest, which amount was alleged to be the aggregate of certain assessments, dues, and premiums which the defendant had received from the plaintiff during his membership in the Association. Plaintiff's cause of action was based upon cer-

tain alleged arbitrary and illegal acts of the defendant Association, in changing the character of its business and substituting for the assessment plan of insurance the methods and figures in use by old line, straight life companies. These acts, it was alleged, were without the plaintiff's knowledge or consent, and served to deprive him of the guaranteed rights which, as a member of the Association, were secured to him by the policy contract, charter, and by-laws of the Company. The petition set forth an unjust and unauthorized revocation by the Association of the plaintiff's contract of insurance, which entitled plaintiff to a return of the money which he had theretofore paid for the contract and the insurance incident thereto. (Record, page 10.) People's Insurance Fund v. Bricken, 92 Ky. 297.

Upon this petition there issued two summonses, one on February 28, 1900, the other on March 1, 1900. The first summons was duly returned on March 1, 1900, by the Sheriff of Franklin County, Kentucky, executed by service thereof upon W. H. Stone, Insurance Commissioner of the State of Kentucky. The second summons was duly returned on March 1, 1900, by W. L. Doolan, special bailiff, executed by service thereof on Ben. Frese, who, as alleged in the officer's return, was, at the time, managing agent of the Mutual Reserve Fund Life Association in Jefferson County, Kentucky. (Record 17.)

On April 14, 1900, after service of process, as above stated, the defendant Company through its local counsel entered its special appearance for the purpose of moving to quash the return both of the Franklin County Sheriff and the Jefferson County Special Bailiff. A motion of the character mentioned was, on April 14, 1900, made before the Jefferson Circuit Court by the defendant Association, and objected to

by the plaintiff. The issues thus formed involved the power and authority of W. H. Stone, Insurance Commissioner of Kentucky, to receive service of process for the Mutual Reserve Fund Life Association, and the agency of Ben. Frese, his relations to the Association, and his right and authority to receive service of process for said Association. The facts as developed at the hearing showed that, pursuant to the requirements of the Kentucky Statutes, the Mutual Reserve Fund Life Association had by resolution of its Board of Directors consented that service of process upon the Commissioner of Insurance of Kentucky in any action brought or pending in the State should be a valid service upon the Association. On October 10, 1899, after an examination of the affairs of the Mutual Reserve, the Insurance Commissioner of Kentucky revoked all authority granted by his department to the Association, which, immediately upon the promulgation of such order of revocation, withdrew from the State its working force but continued all its then existing business in the State and collected a large revenue thereon. Respecting Ben. Frese, the proof of the plaintiff caused it to appear that said Frese had represented himself as the local treasurer of the Mutual Reserve Fund Life Association in Louisville, and had time and again received moneys owing to the Association, and had executed and delivered to persons meeting obligations to the company, receipts signed by the Treasurer of the Mutual Reserve and countersigned by the said Frese as local treasurer. The defendant's proof admitted the testimony of the witnesses for the plaintiff, touching the acts of the said Frese, but by affidavit of its Secretary the Association attempted to show that the Western Bank, and not Ben. Frese, its cashier, was the authorized local treasurer in Louisville.

After proof introduced by both parties and arguments made by their respective counsel, the Jefferson Circuit Court decided, as findings of law and fact, first, that service of process on the Insurance Commissioner was sufficient to bring the defendant before the court, his power to receive service not being prejudiced by the department's revocation spoken of before. Second, that Ben. Frese was at the time of service of summons upon him the local treasurer of the Mutual Reserve Fund Life Association, and as such officer and agent might be served with summons, and the defendant association thereby brought before the court. (Record, p. 21.)

After the decision by the court on the sufficiency of the service of process, the defendant made no further defense, filed no demurrer, answer, or other pleading, and after the regular statutory time had passed the case was duly docketed, and judgment by default for the amount asked in the petition was rendered against the defendant. Upon said judgment, an execution of *fieri facias* was duly issued on May 21, 1900, and returned on June 12, 1900, by the Sheriff of Jefferson County, Kentucky, "no property found." Thereafter, on August 4, 1900, the plaintiff filed in the action theretofore instituted, as set forth above, an amended and supplemental petition stating the steps and proceedings which had theretofore been taken by the court, reciting the rendition of the judgment, the issuance of the execution, and the return thereof by the sheriff. Said amended and supplemental petition further set forth as facts that the defendant Association had been conducting an insurance business in Kentucky for more than fifteen years, that its authority to longer canvass for business had been revoked by the Insurance Commissioner of the State, that the Association

had withdrawn from the State all of its agents and employes who had previously been engaged in the transaction of its business, that the Association was by various schemes and subterfuges attempting to take out of the State its property and assets for the purpose of defrauding creditors resident in the State, that the Association had continued in force its old policy contracts with Kentucky members, and was receiving thereon large sums annually. The amended and supplemental petition, therefore, prayed an attachment against or garnishment of these persisting policy-holders of the Association, or if the court thought best, that a receiver be appointed to take charge of the property owned and held by the defendant in Kentucky, and out of the revenues, income, and profits of the estate so impounded, the satisfaction of plaintiff's judgment might be had. (Record, p. 23.) Upon the filing of this verified amended and supplemental petition (which may also be taken and considered as an affidavit), the Jefferson Circuit Court, on August 4, 1900, made and had entered an order appointing the Fidelity Trust and Safety Vault Company, of Louisville, receiver, in accordance with the prayer of the pleading. In said order the court directed the receiver to take possession of all the assets and estate of the Mutual Reserve Fund Life Association in Kentucky, to collect and receive all moneys, premiums, assets, debts, things in action, and credits then owing or thereafter to accrue to the said defendant Association in Kentucky, and to take and hold the same for the further administration by the court of the said property and income to the end that the judgment of May 19, 1900, might be satisfied. The receiver was authorized to prosecute and defend all such suits at law and in equity as might become necessary in the discharge of its duties, and all policy-holders of defendant

were warned and directed to pay to the said receiver all dues, premiums, and assessments as the same might accrue and become due from them to the company. The order of appointment further provided an injunction against any interference of the receiver in its management, custody, and control of the property sequestered. A bond in the sum of three thousand ($3,000) dollars was required of the receiver, which on August 4, 1900, it executed with its capital stock as security. The bond being approved by the court, the receiver entered at once upon the duties of the trust. (Record, p. 22.)

Thereafter, on August 22, 1900, the defendant Association tendered to the State Court its petition and bond for removal of the cause then pending to the United States Circuit Court. The application coming too late, filing of the pleadings was denied and the parties permitted to proceed. (Record, p. 27.)

The Fidelity Trust & Safety Vault Company, named as Receiver and qualified as such, entered upon the execution of the business committed to its care and custody, took possession of the assets of the Association, which consisted of income-earning contracts, notified the policy-holders of conditions and prepared to carry on the concern. At this point, on August 23, 1900, the Mutual Reserve Fund Life Association, defendant in the State Court as stated, filed its bill in equity in the United States Circuit Court for the Sixth Circuit and District of Kentucky, setting forth among other things the proceedings had in the Jefferson Circuit Court, and prayed the said United States Circuit for a writ of injunction against the said Receiver to restrain it from obeying the mandate of the State Court, and to restrain it from continuing possession of or in any way attempting to control the

assets of the complainant Association in Kentucky. The bill in the United States Circuit Court was based upon the alleged invalidity of the judgment rendered by the State Court on May 19, 1900. The judgment was attacked as void as having been rendered without jurisdiction on the part of the State Court to hear and determine the action, it being set forth in the complainant's bill that the summonses served upon the Insurance Commissioner and Ben. Frese were both ineffective in bringing the defendant Association before the court. The judgment being represented as a nullity, the subsequent proceedings in aid of such judgment were challenged as illegal and prejudicial to complainant's rights. (Record, p. 1.) A copy of the State Court record was filed as an exhibit with the bill.

On August 25, 1900, the two defendants to the Association's bill in the United States Circuit Court, James S. Phelps and the Fidelity Trust & Safety Vault Company, Receiver, entered their joint and separate appearance for the purpose of filing a demurrer and plea to the jurisdiction of the Federal Court, and such demurrer and plea were duly made and entered. In support of the said demurrer and plea it was alleged and contended: first, that there was a want of equity in the bill; second, that the United States Circuit Court was without jurisdiction in the cause, because the amount involved in the controversy was but Nineteen Hundred and Ninety-four Dollars and Twenty Cents, with interest; third, that the United States Circuit Court was without jurisdiction by reason of the prohibition of Section 720 of the Revised Statutes of the United States, denying to the courts of the United States the right and authority to grant a writ of injunction to stay proceedings in any court of a State. (Record, p. 42.) On the same day the United States Circuit Court overruled

said demurrer and plea, and entered an order enjoining the defendants, James S. Phelps and the Fidelity Trust & Safety Vault Company, Receiver, from further carrying out the order of the State Court, and from taking any additional step in the execution of the trust imposed upon the Receiver, and further restraining said parties from seeking in any way to subject to the payment of the judgment of the State Court any of the revenue or the income of the complainant Association derived from dues, assessments, mortuary calls, or premiums that had accrued or might thereafter accrue to the Association from any of its certificate-holders or members. (Record, p. 9.)

On February 2, 1901, the defendants, Phelps and the Fidelity Trust & Safety Vault Company, again appeared in the United States Circuit Court and moved the dissolution of the injunction theretofore issued, upon the same grounds as relied upon in their demurrer and plea to the jurisdiction of the court. Such motion to dissolve was immediately overruled by the Circuit Court, whereupon the defendants filed their petition for appeal, together with an assignment of errors, and the case taken to the United States Circuit Court of Appeals, where it was heard by Circuit Judges Lurton, Day, and Severens. On December 3, 1901, the Circuit Court of Appeals reversed the lower court and remanded the cause with directions to dismiss the ~~appeal~~ bill for want of equity and to dissolve the injunction. From that decision of the Court of Appeals, an appeal has been prosecuted to this court, and the case is here for final determination.

Argument.

The appellees desire to present and discuss the following points:

1. The judgment of the State Court rendered on May 19, 1900, was a valid judgment, being based upon jurisdiction in the court, both of the subject-matter of the suit and all parties thereto.

2. The appointment of the Receiver, made by the State Court on August 4, 1900, was a valid appointment, the procedure adopted being legally sufficient.

3. The motion to remove the cause from the State Court to the United States Circuit Court was properly overruled. The motion as affecting the original petition came too late. The ancillary proceedings by supplemental petition were not removable. In either case the amount in controversy was but $1,994.20 with interest.

4. The property and income impounded by the Receivership was not a trust fund, exempt from process on the judgment of Phelps.

The State Court was, after all, the proper tribunal to decide any question of trust and exemption.

5. No multiplicity of suits threatened the defendant Association in the State Court. If any further litigation was impending, the policy-holders, and not the Association, were concerned. No policy-holder is a party to this cause.

6. The State Court possessed jurisdiction in the case both by actual service of summons on the defendant and by a seizure of the res in controversy.

The Receivership was only a proceeding in aid and execution of the judgment previously secured and then and now unsatisfied.

By the Receivership all assets of the Association were impounded by the State Court.

7. The U. S. Circuit Court was without power or authority to enjoin. Section 720 of the Revised Statutes of the U. S., the comity in vogue among courts of concurrent jurisdiction, the necessities of the case, all deny to the court below power to issue the injunction.

8. The State Court practice offered the appellant Association adequate and effectual remedy for the wrong complained of in its bill before the U. S. Circuit Court.

The procedure adopted is without precedent as it was without justification.

The Validity of the Judgment Rendered by the State Court.

The jurisdiction of the Jefferson Circuit Court, a court of general equity and common law powers, to render the judgment against the Mutual Reserve Fund Life Association was secured by two summonses, properly issued against and regularly served upon the Association. One of the two summonses mentioned was executed upon the Insurance Commissioner of Kentucky, a designated agent for service of process, and the other upon Ben. Frese, the local treasurer of the Association in the State.

(*a.*)

The Company in 1893, by resolution of its directory, had nominated the Insurance Commissioner as an agent upon whom service of process might be had. (Record, p. 34.) The statute law of Kentucky compelled such action on the part of the corporation. (See Appendix.) As long as the Association continued to do business in Kentucky, the authority vested by it in the Commissioner existed. This proposition requires little argument. Any other construction of the statute makes it a trap to catch Kentucky citizens rather than a protection to them from the fraud and false practices of foreign corporations—a result certainly not intended by the Legislature.

At the time of service of process on the Insurance Commissioner, the defendant Association had in force in Kentucky over 1,000 policy contracts, by virtue of which premiums aggregating largely more than $50,000 per annum accrued to and were collected by it. (Record, p. 2.) The mere fact that in October preceding the date of service, the

insurance department of the State had revoked the Association's license to longer canvass for new applications, did not cause the company to cease doing business in Kentucky. This is the ruling of this court in Conn. Mutual Life Insurance Company v. Spratley, 172 U. S. 602, a case syllabized as follows:

"A foreign insurance company which has been doing business within a State through its agents does not cease to do business therein when it withdraws its agent and ceases to obtain or ask for new risks or obtain new policies, while, at the same time, its old policies continue in force."

Swann v. The Mutual Reserve Fund Life Association, 100 Fed. Rep. 922, decided by Judge Evans and remarked upon by him in his opinion in this case, seems founded upon reasoning and establishes a rule hostile to the announcement of the Spratley case, *supra*.

Kerr on Insurance, Section 26, gives this announcement of the law:

"A life insurance company which is merely collecting premiums and paying losses on old policies is still 'doing business' within the meaning of the statute regulating foreign corporations and within the meaning of tax laws."

The Kentucky Court of Appeals, considering the statute of its own State, holds a foreign insurance company to be in court when served with summons as the appellee here was served by process executed on the Commissioner. Home Benefit Society v. Muehl, 22 Ky. Law Rep. 1378; 60 S. W. Rep. 371; Germania Insurance Co. v. Ashby, 23 Ky. Law Rep. 1564.

These decisions of the Kentucky Court of Appeals are controlling upon all other courts, both State and Federal. The controversy between the appellant and appellees to this

appeal, relative to the validity of the judgment rendered by the Jefferson Circuit Court, rests in part upon the construction to be placed on Section 631 of the Kentucky Statutes. The appellant contends that the section referred to continues the authority of the Insurance Commissioner to receive service of process for the Association only so long as it canvassed for and accepted new business within the State. The appellees maintain that Section 631 contemplated authority in the Insurance Commissioner during all times that the Association may possess policy contracts in Kentucky upon which it receives premiums and under which a liability exists. The statute in question has been construed by the court of last resort in Kentucky according to the contention of appellees, and such construction will be adopted by the courts of other jurisdictions. This court has frequently held that "it is the peculiar province and privilege of the State courts to construe their own statutes; and it is no part of the functions of the Supreme Court of the United States to review their decision, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts." Commercial Bank v. Buckingham, 5 How. 317; Lawler v. Walker, 14 How. 149; Central Line Company v. Laidley, 159 U. S. 103.

(*b.*)

The second summons, issued on the petition filed in the State Court, was executed on Ben. Frese, judicially ascertained by the State Court to have been at the time of service the local treasurer of the defendant Association, and an officer who might properly be served with process. Evidence adduced showed that Ben. Frese had represented himself as local treasurer, had received dues, assessments, and

debts due the Mutual Reserve Fund Life Association, and had furnished and countersigned receipts signed by Geo. W. Harper, the Treasurer of the Association in New York. (Record, p. 20.) The Association's letter, appointing a local treasurer in Louisville, is addressed to Ben. Frese, and is filled with directions to him. (Record, page 36.)

The appellant lays much stress on the circumstance that the pleading of Phelps in the State Court states that "after December, 1899, the defendant revoked the authority of such collectors and treasurers." It is insisted that this statement makes it conclusive that no local treasurer existed in Kentucky on March 1, 1900, when Frese was served. As a matter of fact a local treasurer of the Association did remain in Kentucky after December, 1899, that is, until March 12, 1900, as shown by receipts filed in the record by Phelps, and as appears from the affidavit of Camp, the secretary of the Mutual Reserve Fund Life Association.

On the hearing of all questions touching the sufficiency of the service had on the Insurance Commissioner and Ben. Frese, the defendant Association was before the court, in fact, made the motion to quash, upon which the court's rulings of law and fact were made. Under such circumstances the decision of the State Court, relative to the agencies of both the Commissioner and Frese and the authority of these parties to receive service of process for the defendant, was not open to review or reversal by the United States Circuit Court. All questions raised and determined in the State Court were, as to the Federal Court, *res adjudicata*. Mock v. Insurance Company, 10 Fed. Rep. 696. If the State Court committed error in its decision it was reversible error, which upon appeal from the final judgment in the case was cognizable in the Kentucky Court of Appeals.

As said by Judge Lurton in the opinion of the Circuit Court of Appeals:

"Having appeared for the purpose of challenging the jurisdiction of the court, the decision of the court upon that issue is conclusive, until annulled or reversed by some court having jurisdiction to revise and correct error. However erroneous the conclusions of the Jefferson Circuit Court may have been, and we intimate nothing in that respect, its judgment is certainly not void, and in a proceeding of this kind we must accept it as a valid and legal judgment; for neither the circuit court nor this court have any character of appellate or revisory jurisdiction over that court."

Work, on Courts and their Jurisdiction, page 164, states the law thus:

"If there has been an attempted service, and the question is one of fact as to whether the proper service was made, or one of law whether the acts done constituted sufficient service or not, the presumption will be indulged that the court considered and determined the question, and the defect can only be taken advantage of by a direct attack. This rule has been held to apply as well to constructive as to actual notice. And the recitals in the record of a court of general jurisdiction showing that jurisdiction has been obtained by constructive service, are sufficient to uphold the judgment as against a collateral attack."

In the instant case the record of the State Court shows affirmatively that on every question involved in the sufficiency of the service of summons, the defendant Association not only had its day in court, but actually appeared, and by response tried out before the State Court all issues of law and fact.

After the Jefferson Circuit Court held its jurisdiction to have attached, the action proceeded in a regular manner to judgment, due time being afforded the defendant to plead, the case properly docketed, submitted, and considered.

Such in brief is the history of the judgment rendered on May 19, 1900.

The Validity of the Receivership as a Proceeding in Execution of the Judgment.

The judgment having been rendered, an execution of *fi. fa.* issued, was placed in the hands of the Sheriff, and returned by him "no property found." The plaintiff, Phelps, had then, as we submit, the choice of two procedures in aid of his judgment. He might have instituted a separate equitable action under Section 439 of the Kentucky Civil Code of Practice, for a discovery of any property to which the defendant was entitled, and an order subjecting such property to the satisfaction of the judgment. (See Appendix.) Or, the plaintiff could have filed in the same action in which the defendant had been summoned and the judgment secured, a supplemental petition or affidavit, and thus have obtained an attachment, a receivership, or any process by which the defendant's property might be seized and held to answer the judgment debt.

The second-named course was adopted and employed by the plaintiff before the Jefferson Circuit Court, a court which was and is one exercising both common law and equity jurisdiction. The procedure so followed is common to ancient equity practice, and has been approved by the Kentucky Court of Appeals. The case of Caldwell v. Deposit Bank of Eminence, 18 Ky. Law Rep. 156, was a suit to settle the estate of W. P. Hardin, and in that case the Bank filed an answer and counterclaim, setting up a debt to it from Hardin. The pleading was filed March 12, 1892; judgment sustaining the claim was rendered in favor of the bank on March 30, 1892. More than sixty days after the rendition of that final

judgment, and long after the term of court, the bank filed a supplemental pleading in the same action, setting up its judgment, execution, return of *nulla bona*, and prayed the court for an attachment. The court sustained the prayer of the amended petition and held that certain conveyances made by the debtor were fraudulent, ordered the deeds canceled and the property sold to satisfy the judgment. The Court of Appeals reversed the judgment of the lower court on the ground that the property was not liable, but the method of procedure adopted by the bank was never criticised. So in the case of Lewis v. The Deposit Bank of Eminence, 22 Ky. Law Rep. 684, Judge DuRelle refers to the case of Caldwell v. Bank, *supra*, and recites with approval the steps taken in that case by amended and supplemental petition more than sixty days after the rendition of the final judgment as a proceeding in aid of the court's orders.

The learned Judge of U. S. Circuit Court was of the opinion, "that from and after the rendition of the judgment of May 19, 1900, the action in the State Court was *functus officio* for all purposes of pleading, that its force was spent, and all steps attempted to be taken thereafter, except by way of writs for the execution of the judgment, were *coram non judice* and void." (Citing Brown v. Van Cleave, 86 Ky. 381; Meadows v. Goff, 90 Ky. 540.)

These authorities, when examined and understood, do not sustain the proposition announced, that the proceedings taken after the rendition of the judgment of May 19, 1900, to enforce the satisfaction of the same, are *nullities*. On the contrary, Brown v. Van Cleave clearly shows that the subsequent proceedings to enforce the satisfaction of the said judgment against the defendant, under which there had been a return on the *fi. fa.* of *nulla bona*, and which still

remained unsatisfied, were legitimate and proper. In Brown v. Van Cleave the pleading filed subsequent to the rendition of the judgment, which the court condemned as a nullity, was a proceeding not for the satisfaction of the judgment which had been rendered, but a declaration upon a new, separate, and distinct cause of action, which, in the language of Judge Bennett, who pronounced the opinion in the case, was "a distinct and new cause of action, which was in no manner germane to the issues joined in the original action between the appellant and appellee." Said Judge Bennett in that case:

"The object of the amended petition was not to subject the stock to the payment of the notes on account of appellant's liability thereon, because his liability thereon had already been determined by the court, and that liability had been discharged by the payment of the money in court, under its order, in satisfaction of the judgment; but the object of the amendment was to subject the stock to the satisfaction of the remaining portion of the notes, for which it had been adjudged the appellant was not liable. The amendment, therefore, alleged a distinct and new cause of action, which was in no manner germane to the issues joined in the original action between the appellant and appellee. In the original action the judgment against the appellant fixing his liability was complete and final. In the action by the amended proceeding a new, independent, and distinct cause of action was presented, which was prosecuted to a final judgment, from which the appellant has appealed."

Judge Bennett, speaking for the court in that case, further said:

"So, then, after a final judgment had been rendered, and after it had been discharged according to the terms prescribed by the court, the appellee filed an amended petition, in which he set up a new and distinct cause of action against the appellant. The cause of action thus set up was not designed to aid in effectuating the judgment already rendered, for that judgment had been satisfied; but it was

designed to subject the appellant's property to the payment of the remaining portion of the two notes, for the payment of which he, according to the judgment of the court, was not bound. It is thus seen that the amendment proposed a new and distinct cause of action, and for that reason alone the amended petition should have been rejected."

This is the case of Brown v. Van Cleave, upon which the learned judge of the lower court based the proposition that the amended and supplemental petition in this case, which was designed to aid in effectuating a judgment already rendered, which judgment was and still remains unsatisfied, was a nullity. Undoubtedly the court was misled by the syllabus in Brown v. Van Cleave, the second heading of which is in the following words:

"2. Proceedings upon an amended petition filed after judgment, and after the judgment had been discharged, were mere nullities."

Meadows v. Goff, 90 Ky. 540, opinion by Judge Bennett, simply reaffirms the doctrine of Brown v. Van Cleave. These authorities do not sustain Judge Evans in the statement that "the filing of the supplemental petition and the action of the court appointing a receiver thereon should be treated as nullities." When examined and properly understood, the cases referred to expressly sustain the proposition that supplementary proceedings in the court and cause wherein a judgment has been rendered, when taken in aid and in execution thereof, are not nullities, but are proper, legal, legitimate, and valid.

The rendition of the final judgment did not operate in law to take the case off the docket; on the contrary, it remained upon the docket, and the court's jurisdiction and power over it and the parties to it remained for all purposes

tending towards its enforcement and satisfaction. This law was announced by Chief Justice Marshall as far back as Wayman v. Southard, 10 Wheaton, 1:

"The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied."

See also Leathe v. Thomas, 97 Fed. Rep. 136, hereinafter quoted.

The appellant here has been able to cite no authority to support his attack on the validity of the receivership as a proceeding in execution of the judgment. Were there a total want of citation favorable to the contention of the appellee, the decision of the Jefferson Circuit Court would be held to lay down the correct rule. This court in Laing v. Rigney, 160 U. S. 542, which involved the validity of a judgment rendered on a supplemental petition filed and prosecuted without summons being issued thereon, said:

"In the absence of any statutory direction on the subject and of any reported decisions of the Supreme Court of the State we are justified in finding the law to be as declared in the case in hand."

The defendant Insurance Company had been adjudged by the court to be properly before it by legal service of process, and the judgment rendered remained unsatisfied. It was unnecessary to issue a summons against the Association on the amended and supplemental petition, because as no new cause of action was presented therein, it was charged with notice of all steps taken in the case both before and after judgment for the satisfaction thereof, in an action wherein it had its day in court. What possible reason or necessity could there have been to give the defendant notice

that a judgment against it remained unsatisfied, and that the plaintiff, by a verified application to the court setting forth that there was property in the State or choses in action due to it, would ask the court to appoint a receiver to take possession of the same for the purpose of satisfying the judgment? No injury could accrue to the judgment debtor from failing to give it notice that the plaintiff would take steps against it in the very action in which the judgment had been rendered to have the judgment satisfied.

An execution issues on a judgment, and under it property of the defendant is seized without notice being given to the party in interest except such as accrues from the seizure. In the case at bar the assets of the defendant Association in Kentucky could not be reached by execution, and upon this fact being reported to the court, together with the information that the assets were being removed from the State for the purpose of defrauding the plaintiff, the court appointed a receiver to seize the assets and hold them to the satisfaction of the judgment.

The Circuit Court of Appeals in discussing this branch of the case held:

"The power to render that judgment included the power to issue all proper process to enforce its payment. The jurisdiction of the court over the controversy and over the parties, acquired in the primary case by service of process, continued until its judgment should be satisfied. This is a well-settled rule in respect to the jurisdiction of the courts of record. (Wayman v. Southard, 10 Wheat. 1, 22, 6 L. Ed. 253; Riggs v. Johnson Co., 6 Wall. 166, 187, 197, 18 L. Ed. 768; Covell v. Heyman, 111 U. S. 176, 183, 4 Supt. Ct. 355, 28 L. Ed. 390; Railroad Co. v. Gomila, 132 U. S. 478, 483, 10 Sup. Ct. 155, 33 L. Ed. 400.)

"In the instance before us the State court had acquired jurisdiction over the association by service of process upon its duly constituted agents. An execution had been re-

turned 'No property found.' The court by a sworn petition was then advised that this non-resident judgment debtor had no property subject to execution, but that it was in receipt at stated times of dues and premiums upon existing contracts of insurance, and that it has revoked the authority of all its agents and collectors within the State, and was requiring all such accruing dues to be remitted directly to its home office by the policy-holders themselves, and that this method of conducting its business in the State had been resorted to for the purpose of removing its assets beyond the jurisdiction of the State. In this situation, the court was asked to impound and sequester these choses in action, through means of a receiver, that they might be applied to the payment of this judgment. Manifestly, the action of the court in impounding property of the judgment debtor, which could not be reached by execution, was action auxiliary to the primary suit. The proceeding was not in any sense a new suit or separate action. That which the court was asked to do, and that which the court did do, was to take a step in aid of satisfaction of its judgment; and this it did as a proceeding ancillary to the judgment, and by virtue of its previously acquired jurisdiction over the subject-matter of the controversy of the parties. Instead of ordering an *alias fi. fa.*, or an attachment, it appointed a receiver and directed him to take possession of the choses in action, which apparently constituted the only property of the debtor within the jurisdiction. This appointment was made without other than constructive notice. How, otherwise, could it be, if the averments of the supplemental petition were true? Was the court powerless because the judgment debtor was a foreign corporation, unrepresented by agents, and having no property subject to execution?"

The proceeding subsequent to the judgment was distinctively in the nature of a writ for the collection of the judgment. Speaking of receivers similar to the one here in question, Mr. Beach says: "In such a case the appointment is in the nature of an equitable attachment, whereby the court acquires the custody of the property and retains it until the final determination of the case."

The proposition is well sustained that without summons or notice, a court of equity has the power to sequester property through the medium of a receivership when the circumstances of a cause appear to demand such action. Mr. Justice Brewer so holds in Shields v. Coleman, 157 U. S. 178:

"Mr. Justice Matthews, in Heidritter v. Oil Cloth Co., observed: 'But the land might be bound without actual service of process upon the owner, in cases where the only object of the proceedings was to enforce a claim against it specifically, of a nature to bind the title. In such cases the land itself must be drawn within the jurisdiction of the court by some assertion of its control and power over it. This, we have seen, is ordinarily done by actual seizure, but may be done by the mere bringing of the suit in which the claim is sought to be enforced, which may, by law, be equivalent to a seizure, being the open and public exercise of dominion over it for the purpose of the suit.'

"Undoubtedly, the circuit court (of the State) had authority under the bill filed June 6, 1892, to make the order appointing the receiver and taking possession of the property. Even if it were conceded that the bill was imperfect and that amendments were necessary to make it a bill complete in all respects, it would not follow that the court was without jurisdiction. The purpose of the bill—the relief sought—was, among other things, the possession of the property by a receiver to be appointed by the court, and when the court adjudged the bill sufficient and made the appointment, the appointment could not be questioned by another court, or the possession of the receiver thus appointed be disturbed."

Thompson, in his Commentaries on the Law of Corporations, Section 6880, says:

"Where there is no statute requiring notice to be given it is not in all cases indispensably necessary to the validity of the appointment of a receiver that notice of the application should be given to any one. A little reflection will make this more apparent. The appointment does not change any rights of property. In many cases it is a mere interim

impounding of property for the purpose of administering it in the interest of all who have any claims against it or liens upon it. Besides cases may arise in which it may become necessary to effect a seizure of the property before notice can be given, in order to prevent it from being concealed or carried out of the jurisdiction. Moreover, it is to be remembered that a seizure and an impounding of the property in itself conveys notice to its custodian."

Cook on Corporations, treating of the subject here in hand, states the following:

"A receiver of the assets in the jurisdiction belonging to a foreign corporation is more readily appointed *ex parte*, especially where it is difficult to obtain service." Section 863, page 2017.

How much stronger is the case on review, where the receivership was but in execution of a judgment and in a cause where the defendant had been summoned and had appeared.

It has been held that where an application for a receiver is ancillary to the main purposes of a suit, the facts essential to the appointment need not be pleaded, but may be shown by affidavit.

Commercial Bank v. Corbett, 5 Sawy. 172.

The transfer of the case from the common law to the equity docket was in strict conformity to the usual, ordinary, and well-established practice and rules of the Jefferson Circuit Court where, in an action at law, it becomes necessary to take steps authorized by chancery practice. The various certificate- and policy-holders, debtors of the defendant, were not made garnishees, and, of course, Section 227 of the Civil Code does not apply to them, nor were they made parties. Any one of the certificate- or policy-holders, before they could be proceeded against by compulsory process or rule,

would have to be given notice; but it may be remarked with emphasis here that none of the certificate- or policy-holders are parties plaintiff to the bill in equity in the Federal Court; but only the judgment debtor, the defendant foreign corporation, which refused, after service upon its agent and the said Insurance Commissioner of the State, to appear in the State Court, and permitted the judgment to go against it by default, which judgment still remains unsatisfied in the said State Court.

The appellant in its argument before the Circuit Court of Appeals attempted to show that the Kentucky Court of Appeals has held void certain attachments not based upon sufficient service of summons. The cases cited in support of such contention do not sustain the doctrine and the analogy as announced. Admitting, however, the legal rule to exist in Kentucky as urged by appellant, it would only emphasize the propriety and avail of going to the Kentucky Court of Appeals to remedy the alleged error of the Jefferson Circuit Court instead of invoking the interposition of the Federal Court. Appellant by its own argument shows to this court that complete justice could have been secured by the ordinary appeal in the courts of Kentucky. From such considerations spring the proposition stated by Cook on Corporations in Section 863:

"The regularity, propriety, and validity of the appointment of a receiver can be questioned only in the court that appointed him, and only in direct proceeding to test that question."

Mr. Cook supports the above statement with numerous quotations from the courts of various States.

To sanction the course adopted by the Mutual Reserve Fund Life Association in this litigation would of necessity

mean that in every case pending before a State court, where defective or insufficient service of summons, either actual or constructive, has been had, the defendant without seeking relief from the State Circuit Court, without bringing the matter to the attention of the State Court of Appeals, could secure an intervention of the Federal Court, and thus control the State judiciary. A step farther in this line of reasoning brings us to the position that a State Appellate Court would never have an opportunity of establishing rules of practice and procedure, for the manifest reason that all such questions could and would be taken from the State Circuit Court to the Federal Circuit Court. Truly this leaves little of power and dignity in the State tribunals of justice.

A Question of Procedure Alone Involved.

The controversy as respects the receivership will upon close and correct examination resolve itself into a matter of procedure solely. The State Court certainly possessed authority to enforce its judgment. Appellees contend that the receivership was only a form of execution. But if more, the appointment without notice to adversary parties was still within the power of the court. So that there can be involved here only a question as to whether the procedure adopted by the State Court was according to established precedents.

Under the facts there is presented no question of "due process of law." A litigant is not entitled to any particular kind of procedure, nor does the "Fourteenth Amendment"

"Profess to secure all persons in the United States the benefit of the same laws and same remedies. Great diversities in these respects may exist in two States separated

only by an imaginary line." (Missouri v. Lewis, 101 U. S. 31; Brown v. New Jersey.)

"Due process of law is process due according to the law of the land. This process in the State is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land—that is to say, with the Constitution and laws of the United States made in pursuance thereof, or with any treaty made under the authority of the United States. (Art. VI, Const.) Here the State Court had decided that the proceeding below was in accordance with the laws of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States." (Walker v. Sauvinet, 92 U. S. 93.)

"The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution." (Brown v. New Jersey, *supra*.)

"The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named it may avail itself of the wisdom gathered by experience of the century to make such changes as may be necessary." (Hurtado v. California, 110 U. S. 516; Brown v. New Jersey, *supra*.)

"Accordingly, it is held that, although an indictment by grand jury was an essential preliminary to trial for felony at common law, it is within the power of the State to abolish it entirely and proceed by information." (Hurtado v. California, *supra*, etc.; Hodgson v. Vermont, 168 U. S. 262; Bollin v. Nebraska.)

"But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes give reasonable notice and provides fair opportunity to be heard before the issues are decided.

This being the case, it was obviously not a right, privilege, or immunity of a citizen of the United States to have a controversy in the State Court prosecuted or determined by one form of action instead of another. It is also equally evident, provided the form sanctioned by the State law gives notice and affords opportunity to be heard, that the mere question of whether it was by a motion or ordinary action in no way rendered the proceeding not due process of law within the constitutional meaning of those words." (Iowa Central Railroad Company v. Iowa, 160 U. S. 389.)

The appellant here can not in truth complain that it had no opportunity to be heard. The record shows that the Association immediately after the appointment of the receiver by the State Court entered its appearance in that court for the purpose of filing a petition for removal of the receivership proceedings. At the time of filing its bill of complaint in the U. S. Circuit Court, the receiver had collected no money belonging to the Association or in any way prejudiced its rights. Under the order of appointment the receiver was required to hold all property to the further administration by the court. The Association could have secured ample protection in the State Court. It proceeded as it did by reason of a desire to substitute the Federal Court for the State Court in the decision of the case.

It may be true, as appellant insists, that the "proceedings in the State Court was previously unheard of" and yet no question of "due process of law" is presented.

It might be admitted that the proceedings eventuating in the appointment of a receiver were not approved as good practice by the decisions in Kentucky. And yet, upon the very next submission of the question, the Court of Appeals might overrule all former announcements and hold the procedure by supplemental petition or affidavit the correct course. It is certainly not the province of the Federal

Court to perpetuate the first ruling of a State court of last resort on every question of procedure and practice.

The defendant was not injured by any action of the State Court. The receiver is, and was at the time of the appointment, one of the wealthiest corporations in Kentucky. Before being permitted to qualify, the receiver was required to execute bond in the sum of $3,000, and this bond has always stood between the Mutual Reserve Fund Life Association and the irreparable damage complained of in its bill. Had the defendant in the State Court prosecuted an appeal to the Kentucky Court of Appeals, and had it succeeded in reversing the Jefferson Circuit Court, every dollar collected by the receiver would have been paid to the company or returned to the policy-holders. Again, the plaintiff in the State Court, James S. Phelps, is and has been during the period covered by this case a man eminently solvent, with property subject to execution sufficient to reimburse the Association for any sum that he might have improperly secured through the medium of the receivership. These statements, while not appearing by positive allegation in the record, are but fair presumptions from the absence of anything to the contrary appearing in the cause.

The Motion to Remove was Properly Overruled.

Nor were the proceedings subsequent to the rendition of the judgment removable to the United States Court. This was decided by Judge Love in the case of Dere v. Strother, 10 Fed. Rep. 406, from which the following is quoted:

"Every court must, in the nature of things, have the right, as well as the power, to carry its own judgments into execution. To take from any court the prerogative of executing its own judgments by proper process or by supple-

mental proceedings, when necessary, would be to cripple its jurisdiction in a most essential matter. It would, therefore, be difficult to persuade us that Congress meant by the provision in the act of 1875 for the removal of 'suits of a civil nature' to authorize the transfer of controversies growing out of mere modes of execution and relief, thus directly interfering with the State courts in the execution of their own judgments. It is not in this sense that the words 'suits of a civil nature' are ordinarily used.

"Now, the process of garnishment after judgment is clearly a mode of execution. Its purpose is to obtain satisfaction of the judgment out of the debtor's effects which may be in a third person's hands. The garnishment, therefore, is inseparably connected with the judgment. If money is realized, it is to be applied to the satisfaction of the judgment. Suppose that an issue, taken upon the garnishee's answer, should be removed to the Federal Court (the original case remaining, as it must remain, in the State Court), and suppose the Federal Court should deliver judgment against the garnishee, and by execution or otherwise the money should be collected, how could the Federal Court enter satisfaction, the judgment not being under its control? We see in this the embarrassment that must arise from the attempt to separate the garnishment proceeding from the judgment, the latter remaining in one court and the former carried to another and different court."

In the case just quoted, the proceeding taken in execution of the judgment was a garnishment process. In the case at bar, the proceeding was, as held by the court below, "substantially that of garnishment." The prayer of the supplemental petition in the State Court sought a garnishment of all persons indebted to the defendant. The court, seeking to avoid "a multiplicity of parties and burdensome and expensive proceeding," appointed a receiver to accomplish the same result.

No case was shown permitting a removal.

Cook v. Whitney, 3 Woods, 715.

Clafflin v. McDermott, 12 Fed. Rep. 375.

The Cortes Co. v. Thannhausen, 9 Fed. Rep. 226.

Desty's Federal Procedure (9th Ed.), p. 448.

The petition for removal, if considered as contemplating the entire cause, certainly came too late. The original petition was filed on February 28, 1900, the defendant summoned March 1, 1900, the motion to remove made on August 22, 1900. Under the Kentucky practice the defendant has twenty days, after service of summons, to answer.

Fidelity Trust Co. v. N. N. & M. V. Co., 70 Fed. Rep. 403.

No Trust Fund. No Multiplicity of Suits.

Judge Evans, in his opinion herein, says:

"Whether the fund raised by the complainant from mortuary calls and premiums is a trust fund for all its members which can not be diverted to the benefit of a mere creditor is an important question. Ordinarily we might say that such a fund could not be subjected to a creditor's demand in a case like the one in the State Court and by process, which, if anything, is substantially that of garnishment."

The bill of complainant does not contain any allegation justifying such a conclusion on the part of the court. There is no claim made that the entire income of the company was a trust fund exempt from the debts of creditors. The facts, not oversight or lack of disposition, were responsible for the absence in the bill of such statements as are found in the opinion. The dues of the Association are collected for general expenses, never for death losses. The assessments and mortuary calls are determined as to amount, not in view of actually matured death claims, but are arbitrarily fixed to meet all demands to accrue prospectively against the company. The judgment which the appellant, Phelps, sought to collect in the State Court was but a restoration to him of

money which the defendant Association had collected and used for the benefit of its members. These members can therefore not complain when required to return what they have illegally secured and wrongfully retain.

In any event, however, the State Court was the proper tribunal to determine the character and identity of the fund sought to be subjected to the payment of plaintiff's judgment. The following cases are cited as sustaining this view of the law:

The Missionary Society v. Hinman, 13 Fed. Rep. 161. Opinion by McCrary, C. J., Nebraska.

The property of the Missionary Society had been levied upon under a writ from the State Court. The society asked an injunction of the Federal Court to restrain proceeding by the State Court officers on the ground that the property levied upon was trust property and exempt from execution. Upon this contention the court decided:

"Whether this property is trust property belonging to the complainant as trustee, or individual property of the respondent, is one of the questions in dispute between the parties, and is indeed the very question which must be determined by the State Court in the replevin suit. . . . Now, it is perfectly clear that while this injunction is maintained the State Court can not go on and adjudge the possession of the property to be in the respondent. The injunction forbids the respondent to take possession of or to hold the very property which the State Court has directed its officers to place in his hands."

The court then reviews the case in the light of Section 720 of the Revised Statutes, and dissolves the injunction theretofore granted.

Beckett v. Sheriff, 21 Fed. Rep. 32. Opinion by Judge Bond for the Circuit Court of Maryland:

"It is equally clear that no court of the United States has the jurisdiction to take into its possession property

which has been seized and taken into the possession of a State court by any process of that court. And the comity of the courts forbids any such interference between the one and the other. The parties are to seek their remedy in the court whose officer is alleged to have offended, but he can not be arrested by any other court of concurrent jurisdiction. He would be placed in the singular position, in contempt of one court for obeying a writ and of another for not obeying it."

Simpson v. Ward, 80 Fed. Rep. 561. Complainant contended that the Supreme Court of the State was wholly without jurisdiction of the subject-matter, and that the judgment appointing a receiver and ordering a sale was wholly void. Circuit Judge Lacombe, speaking for the Circuit Court, S. D. of New York, remarks:

"It was open to him to apply to the State Court for leave to present the objection to such proceeding, which is now relied upon. The State Court was the proper tribunal to pass upon that objection, since it is a question of the construction of a State statute regulating special proceedings for dissolving State corporations. Complainant by failing to make any effort to present this objection in the proper forum and at the proper time, has been guilty of such gross laches that he is in no position to invoke the favorable consideration of a court of equity, or to ask for an injunction to restrain the receiver appointed by the State Court from carrying out its instructions."

Little need be said respecting the allegation contained both in the bill of complainant and the opinion of the court, that an injunction should issue to prevent a multiplicity of suits threatening in the State Court. In the first place, no suit would have been necessary, as funds sufficient to pay the judgment debt would have been collected by the receiver without further litigation. If suits had been required, of the kind and in the number suggested by the complainant, they could not and would not have affected the defendant

Association. The only parties to an action instituted by the receiver would have been the court's officer and the defaulting policy-holder. The Mutual Reserve Fund Life Association would not have been a proper party, and no liability, even for costs, could have accrued against it. In this aspect of the case it is difficult to understand how the Association can properly complain of a threatened multiplicity of suits, or how any ruling of the court can be predicated thereon. None of the policy-holders or members of the Association, the only persons concerned, appear in this cause either as complainant or defendant.

The United States Circuit Court was Without Power or Authority to Enjoin.

What has previously been said may in a certain way be considered a preface to this chapter of the argument. It is desirable that the court should understand and appreciate the merits of this controversy; but the subject now to be discussed is of larger consequence. That, because this phase of the case must exercise a controlling influence upon the court. More important still is this feature of the cause in its bearing upon the public tranquility. Burke has stated the first and foremost object of the law to be "the preservation of the peace." Recognizing this proposition as indisputable, the authority of any court to invite violence and conflict becomes a matter worthy the most serious reflection. Appellees hope to show that the injunction issued by the lower court, which menaced a community with the evils of forcible conflict between State and Federal officials, was in opposition to every principle of the law.

Section 720 of the Revised Statutes of the United States, the rules of comity in vogue among courts of concurrent

jurisdiction, and the common sense of the situation, all deny to the U. S. Circuit Court the power to issue the injunction found on page 9 of the record.

The section referred to reads as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

Judge Evans felt at liberty to promulgate the order of injunction upon the idea that, having held void all steps taken by the State Court in the matter of the receivership, Section 720 could have no application. Says the court in its opinion:

"The orders appointing the Fidelity Trust & Safety Vault Company, Receiver, being simply nullities, that Company is not an officer of the State Court, and enjoining it in no way enjoins a proceeding in the State tribunal."

It is difficult to grasp the logic of such conclusion. If the amended and supplemental petition filed by the plaintiff in the State Court, upon the allegations and prayer of which the Receiver was appointed, was a suit in equity, then it was authorized by Section 439 of the Kentucky Code. If it was not a suit in equity, but ancillary action taken by the court upon an affidavit labeled an "amended and supplemental petition," then a court of equity had the right, looking to substance and not form, to take the steps noted in the case. In any event there was a PROCEEDING in the State Court.

On page 27 of the record will be found a petition for removal filed in the State Court on August 22, 1900, by the appellant here, in which the steps held by the circuit court to have been "no proceeding" are referred to as "an equita-

ble *action* apparently based or sought to be maintained upon the authority of Sec. 439 of the Code of Practice." In another portion of the petition for removal the Association refers to the case in the State Court: "In said action or suit, the plaintiff, as a basis for attachment or receiver, asserts, etc." Again, in its bill filed in this cause, complainant refers to those same steps, so lightly considered by Judge Evans, as "a *case* or *proceeding* based upon the said so-called amended and supplemental petition." "Your orator exhibits with this bill, as a part thereof, duly certified copies of the *proceedings* consequent upon the said amended and supplemental petition." (Record, pages 5 and 6.)

The situation is admirably stated by the Circuit Court of Appeals:

"The position of the court below, and of the counsel for appellee (appellant here) is that, if the State Court exceeded its jurisdiction by assuming to appoint a receiver in aid of the enforcement of its own judgment without a new summons or notice, the proceedings under which its jurisdiction in that respect was regarded as not being a 'proceeding' within the meaning of Section 720, and that a receiver appointed under such circumstances is not in any sense an officer of the State Court, and that an injunction against such an interloper is 'in no way enjoining a proceeding in a State Court.' To so narrow a construction of the term 'proceedings in any court of a State' we can not assent, and no authority has been produced which sanctions any such definition. The supplemental petition filed in the primary suit was an appeal to the supposed power of the court to order any other or further writs or process necessary to compel payment of its judgment. The petition constituted a 'proceeding' in court, whether we regard it as a new action or as a mere collateral and supplemental pleading. In point of fact the 'proceeding' was regarded neither by the State Court nor by the party filing it as a new action, but as a collateral and supplemental appeal to the continuing jurisdiction of the court until its judgment should be satisfied; and if the action of the State Court is subject to criticism, it is because, when its jurisdic-

tion was thus invoked, it erred in assuming that it might act upon the constructive notice of the primary suit, and without a new writ of summons or any other notice.

"But does it follow, because the State Court exceeded its jurisdiction by thus appointing a receiver in aid of its own judgment without notice, that a court of the United States, upon the application of the judgment debtor and in defiance of the injunction, which forbids any interference with the receiver in the discharge of his duties, may enjoin that receiver from obeying the order of the court, whose officer he colorably was, or dispossess him from the custody of the property which he had been directed to hold? There is no pretense of any prior suit involving the same controversy in the United States Court, nor of any prior possession, constructive or actual, of the *res* which the receiver was ordered to reduce to possession. The injunction of the State Court, forbidding interference with its receiver, is met with a counter injunction forbidding the receiver to proceed with the duties of his appointment, and forbidding his interference with the property of the Mutual Reserve Fund Association, which the State Court had specifically directed him to take possession and custody of. Which court shall the receiver obey? Unless one court or the other shall yield its pretensions, nothing remains but an appeal to force. Fortunately, the State Court, while justifying its action in an opinion of vigor, but commendable courtesy, has directed its receiver to apply to the Circuit Court to discharge its injunction, and to appeal to this court from any other order continuing in operation.

"If there are principles of comity or of statutory construction by which so deplorable a conflict between co-equal courts of concurrent jurisdiction may be avoided, and the operations of our independent systems of judicature rendered harmonious, it is our highest duty to discover and apply them."

Away back in 1807, in the case of Diggs and Keith v. Wolcott, 4 Cranch, 179, it was held by all the Judges of the Supreme Court of the United States, when Marshall was Chief Justice, that the Circuit Court of the United States had no jurisdiction to enjoin proceedings in a State court. The State and Federal courts are, as to each other,

co-equal, independent, foreign forums, judicatures of different systems under two different sovereignties, two separate governments. They are of equal power and dignity, have no common superior, while both exercise in many matters concurrent, co-ordinate jurisdiction, within the same territorial limits. Neither one is responsible to the other; neither one has any appellate authority, jurisdiction or supervisory power over the other; nor has either one the right to supersede, impede or obstruct the jurisdiction of the other, or the power to annul, alter, or modify the orders or judgments of the other, nor to wrest property from the receiver or ministerial officers of the other, held by said receiver or officers under color of legal process issuing from said courts. Neither has power or authority, by injunction or otherwise, to interfere with or prevent receivers or ministerial officers of the other from obeying the mandates, writs or processes of the court issuing the same. Nor has either of said courts right, power or authority to impede or obstruct the other court in the discharge of its juridical, remedial functions, or prevent it from fulfilling its judicial duties.

"These are legal postulates, recognized and enforced by the ablest and most enlightened jurists that have adorned the Supreme bench of the United States and the Federal Circuit benches throughout the United States since the foundation of the Government. The question, therefore, in this case is not a new one, nor determinable upon any novel principle. There is no room here for the play of the faculties of juridical originality and invention. The law upon this subject is a beaten, time-worn, and honored highway, recognized and respected by all citizens, and by the bench and bar of the Union. The doctrine of non-interference by the Federal Courts with the proceedings in the State Courts is a highly important question to the bench and bar of the country, both State and Federal, and to the public at large,

as it affects materially the efficient administration of remedial justice in the State courts, the time-honored principles of which, if departed from or violated, invites and necessarily involves a collision between the State and Federal authorities. Happily for the legal profession and for the country the question presented in this record has received such frequent and comprehensive solutions at the hands of the great jurists of the Union on the Federal bench, both in the Circuit and Supreme Courts, that the only wonder is that a necessity should at this late date again arise for the invocation of those well-established and fundamental principles, by which the judicial sovereignties of the Federal and State courts have been so long governed. Indeed, it is not a matter of comity at all that the Federal Court should not interfere by injunction with the proceedings in the State Court, except in matters of bankruptcy; it is a matter of right, of law, of necessity—nay, of positive statute.

If the injunction in this case is warranted, then the act of Congress, *supra*, passed March 2, 1793, and which has been followed over a hundred years with remarkable unanimity in the courts, is a dead letter upon the Federal statute book. If this injunction is warranted and authorized, then the boasted independence of the State judiciary is a delusion, its assumed power to uphold and enforce its decrees a mockery, and its true status, as an inferior tribunal, subject to the supervisory control of the Federal Courts, is indeed ignominious and contemptible."*

But, as we shall show, the courts of the United States have been as careful to avoid any interference with the sovereignty of State courts as those courts have been jealous of their own power and dignity. The decision of the Federal Circuit Courts, the Circuit Courts of Appeal, and the Supreme Court of the United States present a line of authorities broken for the first time by the judgment entered by the Circuit Court, but set aside by the Circuit Court of Appeals.

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*Extract from opinion of Judge Toney, of Jefferson Circuit Court, on directing the receiver to prosecute appeal in Federal Courts rather than resort to force in maintaining the State Court's rights.

In Taylor v. Carryl, 20 Howard, 583, opinion by Mr. Justice Campbell, the learned court, speaking through that eminent jurist, after reviewing the decisions of the courts of England upon the same question, even there where they have no distinct system as we have in this country, said, referring to the English courts:

"Those courts take efficient measures to maintain their control over property within their custody, and support their officers in defending it with firmness and constancy. The court of chancery does not allow the possession of its receiver, sequestrator, committee or custodee to be disturbed by a party, whether claiming by a title paramount or under the right which they were appointed to protect (Evelyn v. Lewis, 3 Hare, 4725; Madd. 406), as their possession is the possession of the court (Noe v. Gibson, 7, page 713). Nor will the court allow an interfering claimant to question the validity of the orders under which possession was obtained, on the ground that they were improvidently made. (Russell v. East Anglien R. Co., 3 McN. and Gord. 104.) The courts of law uphold the right of their officers to maintain actions to recover property withdrawn from them, and for disturbance to them in the exercise of the duties of their office.

"But it is in this Court (that is, the Supreme Court of the United States) that the principle stated in Payne v. Drew (4 East 553, Lord Ellenborough) has received its clearest illustration and been employed most frequently and with most benignant results. It forms a recognized portion of the duty of this court to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunal of the State and of the Union, so that they may co-operate as harmonious members of a judicial system co-extensive with the United States, and submitting to the paramount authority of the same Constitution, laws, and Federal obligations. The decisions of this Court that disclose such an aim, and that embody the principles and modes of administration to accomplish it, have gone from the court with authority, and have returned to it, bringing the vigor and strength that is always imparted to magistrates, of whatever class, by the approbation and confidence of those submitted to their government."

And in Peck v. Jennes, 7 Howard, 612, opinion by Mr. Justice Grier, we find this language:

"The acts of Congress point out but one mode by which the judgments of State courts can be revised or annulled, and that is by this Court, under the 25th section of the Judiciary Act. In certain cases, where one of the parties is a citizen of another State, he has the privilege of removing his suit to the courts of the United States. But in all other respects they are to be regarded as equal and independent tribunals. It is a doctrine of law too long established to require a citation of authorities, that, when a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether the decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right can not be arrested or taken away by proceedings in another court. These rules have their foundation not merely in comity, but on necessity. For if one be enjoined, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice. In the case of Kennedy against the Earl of Cassilis, Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the Court of Sessions of Scotland, which, on more mature reflection, he dissolved; because it was admitted, if the court of chancery should in that way restrain proceedings in an independent foreign tribunal, the Court of Sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court. The fact, therefore, that an injunction issued only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum." Cited with approval in Bank v. Stevens, 169 U. S. 460, opinion by Mr. Justice Shiras.

Covell v. Heyman, 111 U. S. 179, is perhaps the leading case on the question here involved. What follows is taken from the opinion in that case rendered by Mr. Justice Matthews:

"The point of the decision in Freeman v. Howe, *supra*, is, that when property is taken and held under process, mesne or final, of a Court of the United States, it is in the custody of the law and within the exclusive jurisdiction of the Court from which the process was issued for the purpose of the writ; that the possession of the officer can not be disturbed by process from any State Court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person, not a party to the suit or judgment, whose property has been wrongfully, but under color of process taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds while remaining in the control of that court; but that all other remedies to which he may be entitled, against officers or parties, not involving the withdrawal of the property or its proceeds from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, State or Federal, having jurisdiction over the parties and the subject-matter. And, *vice versa*, the same principle protects the possession of property while thus held, by process issuing from State courts, against any disturbance under process of the courts of the United States; excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States.

"That which can not be done by final process is equally out of reach of original or mesne process.

"The forbearance which courts of co-ordinate jurisdiction administered under a single system exercise toward each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States it is something more. It is a principle of right and of law, and, therefore, of necessity.

It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent and have no common superior. They exercise jurisdiction, it is true, within the same territory but not in the same place, and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process and the decisions of questions relating to it are part of the jurisdiction of the court from which it issues.

"The jurisdiction of a court, said Chief Justice Marshall, is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process, subsequent to the judgment, in which jurisdiction is to be exercised. Wayman v. Southard, 10 Wheat. 1.

"The principle which defines the boundaries of jurisdiction between the judicial tribunals of the States of the United States, the application of which effectually prevents their confusion, was set forth and vindicated in the judgment of this court in Ableman v. Booth, 21 How. 506 (62 U. S. XVI. 169). It was there said by Chief Justice Taney, p. 516 (173), 'That the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court as if the line of division was traced by landmarks and monuments visible to the eye.' And speaking of the procedure in cases of habeas corpus, issued under State authority, and admitting the duty of the officer of the United States, holding the prisoner under its process, to return the fact and show his warrant, the Chief Justice continues: 'But after the return is made and the State judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus nor any other process issued under State authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish

him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. . . . No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and any attempt to enforce it beyond these boundaries is nothing less than lawless violence.' And in Tarble's case, 13 Wall. 397 (80 U. S. 597), commenting on this language of Chief Justice Taney in Ableman v. Booth, *supra*, Mr. Justice Field points out that it was not intended merely to meet cases where the authority of the United States was undisputed, but cases where its validity was questioned, and it appeared that the prisoner was held under claim and color of such authority, in good faith, and not by way of mere pretense and imposition. And the exclusive authority of the court issuing the writ extends, not only to the decision of all questions affecting its jurisdiction and the form and force of the writ itself, and the validity of the proceeding in issuing and executing it, but also of all questions affecting the identity of the person or property seized and held under color of its authority, and the right to exempt them from its operation.

"It does not avail, therefore, to say that, as the writ commands the officer to take the property of the defendant, he can not under that claim take and hold the property of another; because the property which he does actually take, he takes and holds as the property of the defendant, claiming to be such, and therefore he has it in his possession under color of process and claim of right."

The court will find no more instructive case than Senior v. Pierce, 31 Fed. Rep. 628, an opinion prepared by Judge Love sitting for the Circuit Court, District of Iowa. In the opinion, Judges Brewer and Shiras concurred. We quote it extensively:

"The more recent case of Covell v. Heyman, cited *supra*, is entirely conclusive of the questions now before the court. In that case the cases which preceded it were reviewed and explained in terms which leave no doubt whatever as to the rule which should be applied to the matter now at bar. Covell v. Heyman was an action by which the State court of Michigan took from the United States marshal certain per-

sonal property which it was alleged the marshal had wrongfully seized under a writ of execution issued upon a judgment of the Circuit Court of the United States for the Western District of Michigan. The Supreme Court review at length the case of Freeman v. Howe, and expressly sanction and approve the doctrine of that case."

Covell v. Heyman is quoted by the court, which then continues:

"Since, then, property in the hands of an officer of court under legal process is to be considered as in the custody of the court, the officer would clearly have no right to surrender it without an order of the court to whom he owes obedience; and therefore an attempt of an officer of an alien jurisdiction to take the property out of the possession of the officer holding it must, inevitably, either prove futile or lead to a forcible collision. Would the officer in possession be justified in surrendering the property at the mandate of a court foreign to him and without any power whatever to give him protection against the orders of his own court?

"The State and Federal Courts of original jurisdiction are independent of each other. They are equal in power and dignity. The courts of one jurisdiction have no authority or right whatever to command or coerce the courts of the other jurisdiction. How, then, could the Federal Court take property from the custody of the State court against its consent without the use of actual force? But if one jurisdiction may use force, why not the other? Why, if the Federal Court may exert force to take property from the possession of a State court, may not the latter in its turn wrest property from the Federal Court by the same means? Nothing is more evident than that whatever a Federal Court may lawfully do to take property from the State Court, the latter may also in like circumstances do to withdraw property from the possession of a Federal Court. This power, if it exists, must be reciprocal.

"It has been argued that the proceedings before the magistrate who issued the warrant of seizure were irregular; that, in order to give him jurisdiction, the statute should have been strictly pursued, and that consequently the custody of the State officers is without jurisdiction and void. Conceding all this, we are at a loss to see how the question

before us is thus materially affected; for it is nevertheless true that the property in question is in possession of the State court under color of legal process. The case was appealed from the judgment of the justice of the peace to the State district court, and the property is now, therefore, in the custody of that court. How is this court to obtain possession of it without the consent of the State district court, unless by a resort to force to wrest it from the custody of the officer of that court? Suppose we decide that the proceeding was irregular, and the seizure without warrant of law, and void, and suppose the State court holds just the contrary, how is the conflict of judgment between us to be settled? And, if one court, or the other, shall not yield, how is a collision of forces to be avoided? Why should the State court, which first got possession of the property and the controversy, yield to the claim of jurisdiction by this court? By what right, law or authority can this court claim superiority to the State court, or any paramount competency to hear and determine the matter at issue?

"Inasmuch as the very purpose of non-interference is to prevent a conflict between the two jurisdictions, I can see no difference in the application of the principle whether the question to be decided by the two courts is one of jurisdiction or of mere property right, the jurisdiction being conceded. The State court must needs decide for itself whether or not the seizure proceeding was illegal. There is no other tribunal with competent authority to decide this question for the State court. If the Federal Court may decide the question of the regularity of the seizure and jurisdiction adversely to the State court, and proceed to take the property from its custody by force, why may not the State court reciprocally in any parallel case decide the same question when property is in our custody, and proceed by a writ of replevin to dispossess the Marshal? But assuredly, if the Federal Court were in possession by legal process, it would not permit the State court to decide the question of jurisdiction, and wrest the property from our control. The only safe and legitimate course for the suitor is to pursue his remedy by some proper ancillary proceeding in the court first obtaining jurisdiction, and take his appeal, if not satisfied, to the final justice of the Supreme Court of the State, or of the United States, as the case may require. It will not do for the suitor to assume that he can not obtain justice in one jurisdiction or the other. But at all events, it is

infinitely better that injustice should be done and suffered in particular cases than that a course of proceeding should be sustained fraught with all the evils of conflicting judgments and forcible collisions between the two independent jurisdictions."

Senior v. Pierce will be found followed with approval in many subsequent cases.

Dohn v. Ryan, 31 Fed. Rep. 638, opinion by Judge Shiras; Rothschild v. Harbrook, 65 Fed. Rep. 284, opinion by Judge Woolson; In re Hall, 73 Fed. Rep. 530, opinion by Judge Wellborn.

Leathe v. Thomas, 97 Fed. Rep. 136. Opinion of the Circuit Court of Appeals, Seventh Circuit, by Judge Baker.

The bill of complainant sought an injunction against the Sheriff from proceeding with the collection of an execution. The court quotes Section 720, Revised Statutes, and proceeds:

"It is contended that the restraining order does not stay any proceeding in the State court, and that its only purpose is to control the action of the ministerial officer. The prohibition of the statute does not extend to proceedings in a court of the State up to and including final judgment only, but to the entire proceedings from the commencement of the suit until the execution issued on the judgment or decree is satisfied. (Wayman v. Southard, 10 Wheat. 1.)

"Jurisdiction is the power to hear and determine the subject-matter in controversy in the suit before the court, and the rule is universal that if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree, and that jurisdiction continues until that judgment or decree is satisfied. . . . The section above cited (720) is not the only obstacle which prevents the sustaining of the order of injunction. The principle of comity which obtains between courts of concurrent jurisdiction forms a recognized part of their duty. It is firmly established that the application of this principle forbids the courts of the States from interfering by injunction with the mesne or final process

of the courts of the United States; and the same principle in like manner forbids the courts of the United States from interfering by injunction or otherwise with the mesne or final process of the courts of the State."

Mills v. The Provident Trust Co., 100 Fed. Rep. 344. Opinion of the Circuit Court of Appeals, Ninth Circuit, by Judge Ross:

"The bill alleges that the defendant, Mills, as Sheriff of Pierce County, is proceeding to sell property under the writ to satisfy a judgment against the Tacoma National Bank. That the said bank has no legal nor equitable interest in said property, but that the property at all times was the property of the complainant. That such proceedings are illegal, wrongful, and unjust, and will cast a cloud upon the property of complainant, who was not a party to the suit, nor in any way concerned therein."

Upon this state of fact, the court quotes Section 720 of the Revised Statutes, and comments as follows:

"That the levy and sale under an execution issued upon a judgment rendered by a State court is a 'proceeding' in the State court within the meaning of this provision of the Revised Statutes, does not, we think, admit of doubt. . . But the court below was of the opinion that that section applies only to parties and privies to the action in the State court and to cases where the property is subject to the State judgment and writ issued thereon.

"The same view was put forward in the case of the Association against Hurst, 7 C. C. A. 598, but the Circuit Court of Appeals for the Sixth Circuit held, and we think, properly held, to the contrary. In the course of its opinion the court, in that case, showed that the principle underlying the rule of comity not only operates to prevent the interference by one court with the acts of the executive officers of another court of co-ordinate jurisdiction, when done under color of an order or process issuing from such other court in respect to the possession of personal property, but applies as well to an injunction against the levy on and sale of real estate by the officer under color of process; adding that the 'purpose of the statute is so important that a liberal con-

struction should be given to accomplish it.' In this we entirely agree.'' The decision of the lower court, 91 Fed. Rep. 435, was accordingly reversed.

Southern Bank v. Thornton, 75 Fed. Rep. 929. Opinion of the Circuit Court of Appeals, Sixth Circuit, by Judge Lurton:

"The effect of the levy of the attachment issuing from the State Chancery Court, and the return of the writ into court under the Tenn. Statutes and decisions, was to place the attached land within the control and possession of the State Court. It was an actual seizure of the *res*, and thereby passed into the exclusive possession of the court as fully as if a receiver had been appointed. Cooper v. Reynolds, 10 Wall. 308. However defective the proceeding under which the attachment issued, it would not follow that the State Court was without jurisdiction. The object of the bill was to subject the land attached as the property of the Iron Company to the satisfaction of its debts. For this purpose the land itself was seized, and thus drawn within the jurisdiction of the court by this assertion of control and power over it. The validity of that act of power and authority could not be questioned by another court so long as the State Court retained the possession thus acquired.

"The injunction restraining the execution of the decree of the State Court was equally unwarranted, and was in violation of the provisions of Sec. 720 of the Revised Statutes of the United States. That the land ordered to be sold was the property of the suitor invoking the injunctive process of the United States Court is no justification. The binding force of that very wise and conservative statute does not depend upon the real or ultimate rights of the respective claimants of the property involved, or the regularity of the proceedings sought to be stayed. The statute prohibits any injunctive restraint upon the proceedings of a State Court, and jurisdiction is not conferred by vigorous allegations touching the injustice or invalidity of the objectionable proceedings.

Freeman v. Howe. 24 How, 450;
Covell v. Heyman, 111 U. S. 176;
Buck v. Colbath, 3 Wall. 334;
Association v. Hurst, 16 U. S. App. 325."

In re Hall, 73 Fed. Rep. 530. Opinion by Judge Wellborn sitting for the Circuit Court for the S. D. of California:

"The reasoning of this extract unanswerably sustains what has already been said in reference to the matter of possession. Petitioner, however, insists, that the distinguishing feature of the rule of comity is not the possession of the property by the court, but the jurisdiction of the court over the property. Probably there can be found in some of the cases isolated expressions which give countenance to this contention, but it will not bear the test of careful investigation. Wherever, in such cases, the word 'jurisdiction' is employed in this connection, the context, I think, will disclose that it is used synonymously with 'possession.'"

American Association v. Hurst, 59 Federal Rep. 5. Opinion of Circuit Court of Appeals, Sixth Circuit, by Judge Taft, in a case where a total stranger to the State Court proceedings was seeking aid of Federal Court in protection of his property:

"The principle of the decision in Freeman v. Howe, Buck v. Colbath, and Covell v. Heyman has a much broader application than counsel for appellant concede. The principle is that in order to preserve the dignity and protect the effectiveness of the process of courts of concurrent jurisdiction, and to avoid unseemly conflicts between them and between their respective executive officers, no remedy of an injunctive or dispossessary character will be afforded by one court against the acts of the executive officers of the other court when done under color of an order or process issuing from such other court, because it would have the inconvenient and anomalous effect to stay the proceedings in one court to allow another court to investigate the validity of acts done under such proceedings. A replevin of personal property in the hands of its officer, or an injunction against a levy upon personal property by such officer, will certainly not more offend the dignity of the court or more interfere with the due discharge of business before it than will an injunction against a levy on real estate by its officer under color of its process. Moreover, the acts which it was here sought to enjoin were not mere levies upon real estate, but

were the sale of it, and the execution of a deed to the purchaser with a possible writ of possession, or at least with title upon which to found ejectment; so that even if the principle of Freeman v. Howe, and other like cases, only applies when there is to be a conflict of possession between one court and another, we think the remedy here sought would come within their inhibition."

In the case last cited the interposition of the Federal Court was sought and an injunction asked on the ground that the State Court was acting without its jurisdiction, and that there had been no valid proceeding. This contention was made for the purpose of saving the suit in the Federal Court from the prohibition of Section 720 of the Revised Statutes. But Judge Taft refused to consider the question as to whether the action of the State Court was or was not a valid proceeding on the ground, as he states, that "all proceedings of a State Court are inviolate from injunctive interference by the Federal judiciary."

Hutchinson v. Green, 6 Fed. Rep. 838. Opinion by Circuit Judge McCrary, sitting in the Eastern District of Missouri:

"The rule is that no injunction shall be granted by any court to interfere with the possession, control, or disposition of property which is in the hands of another court of coordinate jurisdiction. The reason for the rule is that its disregard would lead to conflicts between courts of equal authority and recognizing no common arbiter, which conflicts might lead to the most serious and disastrous consequences. The great importance of the strict observance of this rule in the administration of justice in our State and Federal Courts has always been recognized in both forums, and for reasons which at once suggest themselves as very cogent. I am disposed, so far as I am concerned, to uphold it fully, and even in cases of doubt to lean toward the adoption of that view which can not possibly lead to conflict."

Rensselaer R. Co. v. Bennington R. Co., 18 Fed. Rep. 617. Opinion by Judge Wheeler, sitting for the Circuit Court for the District of Vermont:

"This bill is brought to restrain the defendant from entering upon the railroad of the orator, on the ground that the contemplated invasion is under a decision of the State Court based upon a void statute of the legislature.

"In Section 720 of the Revised Statutes it is provided that the writ of injunction shall not be granted by a court of the United States to stay proceedings in any court of a State, except when authorized in bankruptcy proceedings. This provision of the statutes is strictly applied wherever the restraint of any independent proceedings of a State court is attempted. Haines v. Carpenter, 91 U. S. 254; Dial v. Reynolds, 96 U. S. 340. Suits in State Courts, wherein it is attempted to defeat the result of proceedings in the Federal courts, have been enjoined in the Federal courts on the ground that such courts must have full control over the enforcement of their judgments and decrees, as well as of the rendering of them. Deitzsch v. Huidekoper, *supra*; French v. Hayes, *supra*. Mr. Justice Bradley, in delivering the opinion of the court in Haines v. Carpenter, said: 'In the first place, the great object of the suit is to enjoin and stop litigation in the State courts, and to bring all the litigated questions before the Circuit Court. This is one of the things which the Federal courts are expressly prohibited from doing.' The right of citizens of other States to have their litigation generally, and the rights of all to have Federal questions tried in the Federal courts, are provided for by the statutes relating to the removal of cases from the State to Federal courts, and to writs of error from the Supreme Court of the United States to the highest court of the State, and are not left at all to be effectuated by injunction from one court to the other."

Yick Wo v. Crowley, 26 Fed. Rep., p. 207. Opinion by Judge Sawyer, sitting for the Circuit Court for the District of California.

In the bill the complainant alleges that Crowley is the chief of police of San Francisco, and that he is about to

arrest complainant. The procedure being alleged to be based on a void ordinance, "the injunctive process of the Federal Court is prayed":

"In the bill the court is asked to restrain the execution of process issued by a State court and placed in the hands of the Chief of Police, whose duty it is to execute that process. The service of process is a proceeding in court.

"The proceedings which are here sought to be restrained are proceedings in a State court, in which warrants have been issued against the complainant and many others, and placed in the hands of the executive officer of the court for service. It is sought to enjoin the service of process, which would be to stay the proceedings and prevent the court from acting in the case. This is clearly within the prohibition of the statute, as repeatedly construed by the courts; and this court has no authority to restrain those proceedings. Within the last fifteen years a great many applications, under a great variety of circumstances, have been made in this court for preliminary injunctions to restrain proceedings in the State courts in civil causes, and they have invariably been denied. This court has no authority to restrain proceedings first commenced in a State court, nor has a State court authority to restrain proceedings in this court. The court, therefore, has no jurisdiction to grant the relief sought in this bill."

To the same effect is Rhodes Manufacturing Co. v. New Hampshire, 70 Fed. Rep. 72.

Dillon v. Kansas City R. Co., 43 Fed. Rep. 111. Opinion by Judge Phillips, sitting for the Circuit Court for the W. D. of Missouri:

"Section 720 of the Rev. St. was an addition to the act establishing the judicial courts of the United States, passed as early as March 2, 1793, and this limitation on the jurisdiction of Federal Courts was placed upon the statute to give the force of positive law to this rule of comity, in order to preserve the essential and necessary comity between the Federal and State courts, and to maintain the independence of each. . . .

"So here the Belt Railway Company, under the authority of the State statutes, claims that in the condemnation proceedings in progress in the State Court, after the coming in and filing of the report of the Commissioner, and the payment into the clerk's office of the damages assessed, it has a right to enter upon the tracks of the Missouri Pacific Railway Company for the construction of the proposed crossing. The contention of counsel for the Missouri Pacific is that such asserted right is premature at said stage of the proceeding in the State court, and can not be lawfully asserted until after disposition of the exceptions to the report, and after the exercise of the right of a trial *de novo* before a jury, at its demand. But that is the very question in controversy and pending in the State court, which it is competent to decide; and the unavoidable effect of a decree of injunction from this court is to stay the right of entry claimed by the party seeking the condemnation in the proceeding in the State court, and to draw the litigation and determination of that very question in this court. And if the order and decree of this court is to effectuate and accomplish the manifest purpose of this application for a writ of injunction, it must stop and foreclose any further proceedings in the State court. We can not shut our eyes to obvious facts, and hear only the form and semblance of things."

Missouri R. Co. v. Scott, 13 Fed. Rep. 793. Opinion by Judge Pardee, sitting for the N. D. of Texas:

"Section 720 of the Revised Statutes provides: 'The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.' This statute prevents this court from granting the injunction asked for, even if the complainant has otherwise a proper case for such relief. . . . The case here, where we are asked to enjoin all further proceedings, is one where the State court undoubtedly had prior jurisdiction, and the question as to whether that jurisdiction is ended is in dispute between the parties; the State court undoubtedly still claiming jurisdiction notwithstanding the petition and bond filed therein to remove the case to this court.

"The injunction asked for must be refused."

In Tarble's case, 13 Wall. 401, Mr. Justice Field deals at length with the subject of the respective authorities of State and Federal courts:

"The constitution, as said by Mr. Chief Justice Taney, 'was not framed merely to guard the State against danger from abroad, but chiefly to secure union and harmony at home; and to accomplish this end it was deemed necessary when the constitution was framed, that many of the rights of sovereignty which the States then possessed should be ceded to the general government; and that in the sphere of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals without interposition from a State or from State authorities.

"Such being the distinct and independent character of two governments within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other. In their laws and mode of enforcement neither is responsible to the other. How their respective laws shall be enacted, how they shall be carried into execution; and in what tribunals and by what officers, and how much discretion, and whether any, at all, shall be vested in their officers, are matters subject to their own control, in the regulation of which neither can interfere with the other.

"Some attempt has been made in adjudications to which our attention has been called to limit the decision of this court in Ableman v. Booth and U. S. v. Booth to cases where a prisoner is held in custody under undisputed lawful authority of the United States, as distinguished from imprisonment under claim and color of such authority. But it is evident that the decision does not admit of any such limitation."

Gates v. Bucki, 53 Fed. Rep. 964. Opinion by Justice Shiras, sitting for the Circuit Court of Appeals for the Eighth Circuit.

Suit by Charles L. Bucki against Victor and Ferdinand Gates, in which an interlocutory injunction was granted by the Circuit Court restraining Gates from applying to a

State Court for an injunction. Review of such order by Circuit Court of Appeals:

"It was not for the United States Circuit Court to dictate to the State court as to who should or who should not be made a party to the proceedings pending before it, and therefore it was, we presume, that the Federal court did not grant a writ to the effect asked by the applicant. . . . It is just as much the duty and the right and within the power of the State courts to secure to litigants therein the full benefit of the judgments therein pronounced as it is in like circumstances the duty of the Federal court to extend protection to litigants within its jurisdiction. . . . What steps should be taken and what process should be issued in connection with the proceedings before it is primarily for that court to determine, and we fail to find in the record before us any ground upon which to base the right to issue the writ of injunction which was in fact granted by the court below. . . . The Federal court is not, therefore, possessed of any control or jurisdiction over the realty described in the mortgage which authorizes it to enjoin the litigants in the State court from applying to that court for such relief as that court may deem is equitable and necessary. . . . It follows that the order appealed from, granting the writ of injunction in question, must be and is reversed."

This eminently respectable array of authorities, unbroken by a single conflicting decision, is challenged by adversary counsel as being "cases not in point, the State Court having had jurisdiction in every instance where injunction was refused." The indictment can not be sustained unless counsel employed the term "jurisdiction" synonymously with "possession," as Judge Wellborn, In re Hall, suggests has frequently been done.

In the case at bar, however, we find jurisdiction in the State Court secured both by service of process on the defendant Association, and by seizure of the property in dispute.

This court will understand that the Jefferson Circuit Court had through its receiver taken possession of all assets

of the Association in Kentucky. These assets consisted for the most part of policy contracts upon which the Association was deriving a profit. The receiver had notified policyholders of his appointment, and the fact that he was in possession of the Association's business, and required of them payment to him of whatever income might accrue from the property seized. All of this had taken place before proceedings were commenced in the U. S. Circuit Court. The appellant, in its bill of complaint filed herein, alleges that the State Court had taken its property, but without due process. Having taken the property, it would seem that the State Court must surely have obtained jurisdiction of the *res*.

The Circuit Court of Appeals sustained this contention of appellees in the following language:

"The effect of the appointment of the appellant as receiver, under the terms of the order, already cited, was to place him constructively in possession of the property of the appellee Association within the State of Kentucky. To obtain actual possession he had, when enjoined, notified the Association debtors to pay their debts to him, and had thus done all that was possible, without instituting suit, to reduce these choses in action to his actual possession. Is it possible that under such circumstances the receiver may be ousted from its constructive possession, and the hand of the State Court stayed, while the United States Court determines the question as to whether under the law of Kentucky the State Court had the jurisdiction to make the order and take the step complained of? No case has been cited which gives support to this contention. It is not relevant to say that a void judgment is a nullity, and that whenever it is set up as a justification its voidness may be shown. Nor is it relevant to say that the jurisdiction of the court is always a subject of inquiry when a foreign judgment is sued upon."

Counsel for appellant rely upon a line of cases where, after removal of the case from the State Court, the Federal Court issued an order of injunction, and again where in

an independent action to avoid a judgment on the ground of fraud, the State court was enjoined from executing the judgment nullified by the Federal Court. Judge Lurton denied the applicability of such authorities:

"It is plain that in all these cases the Federal Court was violating no rule of comity, for in every one of the supposed exceptions to the statute the court was either protecting its own prior possession of the *res*, or of the controversy, or enforcing its own judgment. This is true of a suit for the nullification of a judgment upon the ground of fraud. The relief sought in such a case would be the subject of an independent suit in equity, and, if the requisite diversity of citizenship existed, such a suit could be maintained in a circuit court of the United States, and any injunction against the enforcement of the judgment nullified for fraud would be mere process for the enforcement of its own judgment, and operative only through its jurisdiction over the parties thereto. In passing, however, it may be observed that in none of the cases of this class reported was an injunction actually granted in the Federal Court. In Marshall v. Holmes an injunction was allowed in the State Court before removal. This remained in force, for the cause stands after removal just the same as it did before. Bondurant v. Watson, 103 U. S. 281, 287, 26 L. Ed. 447. None of these instances of so-called exceptions made by judicial construction of the statute apply to the case in hand."

The cases cited by counsel before the Circuit Court of Appeals and in this court are to be distinguished from the instant submission by a casual reading. The case of Terre Haute, etc., R. Co. v. Peoria, etc., R. Co., 82 Fed. Rep. 943, has been referred to on several occasions by the Federal courts, but always in support of the proposition that

"A court of the United States is not prevented from enforcing its own judgment by the statute which forbids it to grant an injunction to stay proceedings in a State court." Fidelity, etc., Co. v. Norfolk, etc., Co., 88 Federal Rep. 821, and Staar v. Chicago, etc., Co., 110 Fed. Rep. 7; Riverdale Mills v. Alabama, etc., Co., 111 Fed. Rep. 432.

Here the Circuit Court had no previous connection with either party or property until the bill of complaint was filed. And it is to be noted that the bill of complaint does not seek any other relief than an order of injunction. The Federal Court is not asked by the bill to nullify any judgment or hold void any action of the State Court. The bill prays only an injunction to restrain parties and officers of the State Court from continuing to proceed in the State Court. (Record p. 7.)

If the following statement, from the argument of appellant, sets forth the entire law: "Where the State Court is acting within the limits of its jurisdiction, or its officers are enforcing its valid orders or decrees, it is recognized that no Federal Court should impede or avert any action so taken," if this be the limit of all prohibition upon Federal Courts, what becomes of Section 720 of the Revised Statutes? No court of the United States, no self-respecting court anywhere, would attempt to impede or avert action taken by another court within the limit of its jurisdiction, or when its officers are enforcing its valid orders or decrees. It is only where courts of the United States consider that State courts are acting without jurisdiction, or its officers are enforcing invalid orders, that they would be moved to enjoin proceedings in such State Court. To meet just such a case Section 720 was passed, and in such manner must it be construed.

Appellees close this phase of their case with the very appropriate language of Judge Speer:

"These citations of elevated and paramount authority are perhaps more copious than is requisite, but since nothing would so seriously prejudice the character and usefulness of the courts of the United States or of the State as those unseemly conflicts of authority which not only excite communities, but which, both in this country and in England,

have afforded occasions for intemperateness in the assertion of jurisdiction on the one hand, and for its denial in the other, hardly comporting with the serene and impartial reserve of the bench, the settled rule upon the subject whenever its announcement is appropriate can not be too strongly emphasized or too amply supported by those impregnable statements of principle which stand out in the decisions of the Supreme Court of the United States, statements which bear in lucid phrase the precise expression of sovereign and beneficent laws. Moreover the apparent conflicts of authority between the courts of the State and of the United States furnish no proper occasion for nice or narrow divisions of the subject of litigation—none for divisions of jurisdiction. In a case like that before the court, the court first taking jurisdiction of the substance of the litigation should dispose of all the incidents." Teft v. Sternberg, 40 Fed. Rep. 6.

The Proper Procedure.

Senior v. Pierce, 31 Fed. Rep., and Rensselaer v. Bennington R. Co., 18 Fed. Rep., cited *supra*, and Judge Lurton's opinion in this record, suggest the proper method of bringing to the attention of a court of the United States the decision of a State Court involving either the merits of a controversy or a question of jurisdiction. The usual practice requires an appeal to the highest court of the State, and from thence, by writ of error, to the Supreme Court of the United States.

In C. & O. R. R. Co. v. White, 111 U. S. 137, Mr. Justice White, in refusing an application for an injunction to restrain a State Court from acting in a matter claimed to be without its jurisdiction, gives this announcement of the law:

"The Circuit Court (of the State), when it in June, 1882, declined to order a trial, did not abandon its jurisdiction. It still retained the suit, so far as any action of its own was concerned. If a sufficient cause for removal was made in the Circuit Court, the rightful jurisdiction of that court is

gone, and it can not properly proceed further; but if it does proceed and does force the defendant, who applied for the removal, to a trial, the remedy is by writ of error after final judgment, and not by prohibition of punishment for contempt. The proper practice in such cases was fully considered in Insurance Co. v. Dunn, 19 Wall. 214; Removal cases, 100 U. S. 457; R. R. Co. v. Miss., 102 U. S. 135; R. R. Co. v. Koontz, 104 U. S. 14."

So also Peck v. Jennes, 7 Howard, *supra*.

Says Judge Lurton in the instant case:

"It will not do to say that the owner of property taken constructively or actually, or about to be taken, by invalid order or process of a court of another jurisdiction, is otherwise without remedy. Such an owner may apply for relief to the court under whose authority his property has been seized. Freeman v. Howe, 24 How. 450, 16 L. Ed. 749; Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390; Association v. Hurst, 7 C. C. A. 598, 59 Fed. 1, 16 U. S. App. 325; Gumbel v. Pitkin, 124 U. S. 1231, 8 Sup. Ct. 379, 31 L. Ed. 374; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Lammon v. Feusier, 111 U. S. 17, 4 Sup. Ct. 286, 28 L. Ed. 337. If the officer taking the property exceeds the authority of his writ, he may be sued in any court having jurisdiction in an action of trespass. Buck v. Colbath, 3 Wall. 334, 18 L. Ed. 257. A third remedy consists in the right to sue for the recovery of the property after the hand of the court seizing it has been raised. If the taking was under a proceeding void for want of due process of law, the title of one acquiring it under such an invalid proceeding would be unavailing. Cooper v. Newell, 173 U. S. 555, 19 Sup. Ct. 506, 43 L. Ed. 808."

Counsel for the Association argue that the procedure suggested did not afford their client adequate relief, because as they contend, an appeal to the Court of Appeals of Kentucky, would, under the authorities of the State Court, have been an entry of appearance. We submit that had the appellant Association taken an appeal to the court of last resort of the State for the purpose of testing the jurisdiction

of the State Court, and had such appellate court construed the appeal as itself an entry of appearance, then this court upon writ of error would review the entire case, and if proper would reverse the rulings of the State Circuit Court and the Court of Appeals.

The appellant in its assignments of error filed on this appeal sets forth that the intervention of the Federal court was the "only adequate and effectual remedy of enforcing the prohibition of the Fourteenth Amendment of the Constitution of the United States, and the only adequate and effectual remedy to prevent the State court's taking appellant's property without due process of law." This is not true.

In addition to the remedies suggested by Judge Lurton and those heretofore proposed in this brief, all open to appellant and each adequate for its fullest protection, we desire to call the court's attention to another procedure whose effectiveness the appellant can not dispute.

A writ of prohibition might have been secured from the Kentucky Court of Appeals, if the Jefferson Circuit Court was proceeding without jurisdiction or due process of law.

Regarding the use and scope of such writ of prohibition, the following quotation from the opinion of Chief Justice Hazelrigg, in Weaver v. Toney, Judge, 107 Ky. 419, should be read.

"In Preston v. Fidelity Trust and Safety Vault Company, 94 Ky. 295, (22 S. W. 318); Goldsmith v. Owen, 95 Ky. 420 (26 S. W. 8), and Louisville Savings L. & B. Association v. Harbeson, Judge, &c., 21 Ky. L. R. 278 (51 S. W. 787), the power of this court to issue writs of prohibition seems to have been assumed, rather than in terms asserted; the writs sought being denied because it did not appear that the inferior courts were proceeding out of their jurisdiction.

All these cases present very persuasive evidence in support of the jurisdiction.

"And in Hindman v. Toney, 97 Ky. 413 (30 S. W. 1006), this court expressly settled the question, and, on the petition of Hindman, granted a writ prohibiting one of the Circuit Judges of Jefferson County from passing on the case, which properly had been assigned to another division of that court. And the writ was awarded, it may be said here, although by express statute (Kentucky Statutes, Section 1028) no proceedings in a case were to be invalid because prosecuted in the wrong branch of the Jefferson Circuit Court. It was hardly a question of jurisdiction in the lower court, therefore, but rather a question of preventing confusion and conflict in the conduct of business in the four branches of that court. It was held in that case that this court having a discretion, ought not generally to issue writs of prohibition, when adequate relief can be afforded complainants by resort to the 'revisory power,' meaning the appellate jurisdiction of this court.

"In view of these cases, it must be regarded as settled law that in proper cases, where the inferior tribunal is proceeding out of its jurisdiction, the power of this court may be invoked to stay the exercise of such jurisdiction; and it would also seem, in certain classes of cases, that even where the inferior tribunal has jurisdiction this court may likewise interfere, if the remedy by appeal is not entirely adequate, or if the court, in the exercise of its discretionary powers, shall deem it necessary to so interfere."

The appellant Association seemed determined to avoid the courts of Kentucky, no matter how numerous or sufficient were the remedies which Kentucky practice sanctions, and which safeguards the rights of the litigant. Had the Association asked any court of the Commonwealth for relief, and its application had been denied, its position here might be viewed with some patience. But when a party has never stated its grounds of complaint to the State court, or in any way afforded the State court opportunity to correct its alleged errors, Federal courts ought not and will not nterfere by injunction to revise or reverse.

The Amount in Controversy.

The petition filed in the State court sought a recovery "in the sum of $1,994.20, with interest on the various amounts going to make up said sum from the dates of payment." (Record, p. 16.) The judgment follows the prayer of the petition and adjudges "that the plaintiff recover of the defendant the sum of $1,994, with interest, etc." (Record, p. 21.) This is the only amount that has ever been involved in the case as prosecuted in the State court, or as it is presented to the United States Circuit Court. It is only by computing interest that an amount sufficient to give the lower court jurisdiction is reached, and interest is excluded in the determination of the sum involved.

The appellant works out the jurisdictional amount by representing, through allegation and affidavit, that the loss which threatened the Association on account of disorganized business exceeded $2,000, exclusive of interest. This, we believe, is an erroneous method of calculation. The only amount in controversy was $1,994.20, with interest, which amount the defendant Association might have paid under protest to the receiver, and so ended the receiver's connection with the business of the Association.

In conclusion we would again suggest that there is something more important involved here than the collection of a judgment debt. The district judge has in this case assumed a power never considered or conceived by the framers of the Federal Constitution. When the convention had under discussion the provisions of the Constitution relative to the judicial power and jurisdiction of courts of the United States,

George Mason, voicing the sentiments of no insignificant minority, thus arraigned a delegation of authority that has since come to be regarded as proper:

"To what disgraceful and dangerous length does the principle of this go? If your State judiciaries are not to be trusted with the administration of common justice and decision of dispute respecting property between man and man, much less ought the State government to be trusted with the power of legislation."

Had it occurred to Mason that the future would see not only the Supreme Court entertaining appeals from the various Federal courts and the courts of last resort of States in matters specified in the constitution, but the United States Circuit Courts acting as courts of review and revision of the judgments and decrees of subordinate State courts on every question involving process, procedure, or jurisdiction—intensity of feeling would have caused him to be either profoundly silent or profane.

Respectfully,

BENJAMIN F. WASHER,
Counsel for Appellees.

FREDERICK FORCHT,
WILLIAM H. FIELD,
NORTON L. GOLDSMITH,
Of Counsel.

Appendix.

Section 631 of the Kentucky Statutes.

"Before authority is granted to any foreign insurance company to do business in this State, it must file with the Commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the Commissioner of Insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the Commissioner, it shall be his duty to at once send it by mail, addressed to the company at its principal office."

Section 439 of the Kentucky Civil Code of Practice.

"After an execution of *fieri facias*, directed to the county in which the judgment was rendered, or to the county of the defendant's residence, is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the same, the plaintiff in the execution may institute an equitable action for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the judgment; and in such actions, persons indebted to the defendant, or holding money or property in which he has an interest, or holding evidences or securities for the same, may be also made defendants."

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JAMES H. McKENNEY,
Clerk.

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Supreme Court of the United States,

OCTOBER TERM, 1902.

NO. 263.

MUTUAL RESERVE FUND LIFE ASSOCIATION, . . . *Appellant*,

vs.

JAMES S. PHELPS AND FIDELITY TRUST AND SAFETY VAULT COMPANY, ... *Appellees*.

Supplemental Brief for Appellees.

BENJAMIN F. WASHER,
For Appellees.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 6793

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Supreme Court of the United States.

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MUTUAL RESERVE FUND LIFE ASSOCIATION, . . . *Appellant,*

vs.

JAMES S. PHELPS AND FIDELITY TRUST & SAFETY VAULT COMPANY, ... *Appellees.*

Supplemental Brief for Appellees.

(1.) This case has been heard and determined by the Circuit Court and Circuit Court of Appeals upon the two questions: (*a.*) Did the Jefferson Circuit Court in the proceedings, a complete record of which is filed with the bill in the U. S. Court, act within its jurisdiction? (*b.*) In any event, did the Circuit Court of the United States possess jurisdiction to enjoin the proceedings in the State Court?

These two questions are now before this Court. (See Assignments of Error, Rec., p. 74.) In addition, this Court is required to decide if anything complained of by appellant was or is repugnant to the 14th Amendment.

(2.) The issue of fact raised and litigated by the appellant itself in the State Court respecting the agency of B. Frese, is *res adjudicata* here. The decision of the Jefferson Circuit Court controls all other courts except those having direct appellate jurisdiction.

Moch *vs.* Insurance Co., 10 Fed. Rep. 707, and authorities therein cited.

Black on Judgments, sect. 273.

(3.) The Court of Appeals of Kentucky has construed section 631 of the Kentucky Statutes as authorizing a valid service of summons on the Insurance Commissioner under the facts of this case. Such construction will be adopted by this Court, as the appellant does not allege or argue that the construction given to the statute violates any provision of the Constitution.

"Unless the construction of the State Court make the Legislature to do an act which the Legislature cannot constitutionally do—if the Legislature might rightfully have done precisely what the interpretation of the State courts says it did do—can it be possible that there is any violation of the Constitution?"

Commercial Bank *vs.* Buckingham, 5 How. 326.

Murray *vs.* Gibson, 15 How. 423.

Guthrie on 14th Amendment, p. 44.

(4.) The receivership here was in the nature of an equitable garnishment resorted to solely for the purpose of executing a valid judgment then and now unsatisfied.

Opinion of U. S. Circuit Court.

Opinion of Circuit Court of Appeals.

"The process of garnishment after judgment is clearly a mode of execution. Its purpose is to obtain satisfaction of the judgment out of the debtor's effects which are in a third person's hands."

Dere *vs.* Strother, 10 Fed. Rep. 406.

Every court is left to decide for itself in what way and by what procedure its judgments and decrees are to be enforced; subject, of course, to review by its own appellate tribunals.

In Riggs *vs.* Johnson County, 6 Wall. 198, a mandamus was asked and granted in execution of a judgment, and this Court held it to be "neither a prerogative writ or a new suit in the jurisdictional sense. On the contrary, it is a proceeding ancillary to judgment which gives the jurisdiction, and when issued becomes a substitute for the ordinary process of execution to enforce the payment of the same."

Again, in Central Bank *vs.* Stephens, 169 U. S. 432:

"It has been frequently determined by this court that the jurisdiction of a court is not exhausted by the rendition of the judgment but continues until the judgment shall be satisfied. * * *

"An execution is the end of the law. It gives the successful party the fruits of his judgment. But it is scarcely necessary to quote authorities to show that to deprive a court of the power to execute its decrees is to essentially impair its jurisdiction."

(5.) Appellant states (brief, p. 41) that "the precise question of the right to appoint a receiver *in execution of a final judgment* without again bringing the judgment debtor into

court has never been before the Kentucky Court of Appeals."

Then, "in the absence of reported decisions by the Supreme Court of the State, this Court is justified in finding the law to be as declared in the case in hand."

Laing *vs.* Rigney, 160 U. S. 542.

But in Caldwell *vs.* Bank, 18 Ky. Law Rep. 156, and Rupert *vs.* Bank, 22 Ky. Law Rep. 684, the Kentucky Court of Appeals permitted an attachment in execution of a final judgment. The reply brief of appellant is in error in its intimation that those cases were controlled by section 436 or any provision of the Kentucky Code of Practice.

The quotations contained in appellant's brief are all from cases in which judgments were attempted to be set aside after they had become final. Quite different, we submit, from the case in hand, where the judgment was only sought to be executed.

The Kentucky cases cited by appellant, without exception, involved an attachment issued and prosecuted on a simple demand in an original, primary action and without summons or notice. Here, the "proceedings in the nature of attachment" were in a suit already instituted, in which the defendant had been summoned, and to enforce a judgment that it knew existed and was unpaid.

(6.) Income-earning contracts, the good will of a business, a franchise, and many other forms of incorporeal hereditaments are property capable of being taken into possession under process and by an officer of the court.

As, a seat in the Cotton Exchange:

Powell *vs.* Waldron, 89 N. Y. 328;

the mere right to rents and profits:

Stephen *vs.* Riebling, 45 Ill. App. 40;

a claim for damages based on fraud:

Rand, Receiver, *vs.* Wright, 141 Ind. 226.

The appellant association had at the time of the appointment of the Receiver by the Jefferson Circuit Court "largely more than one thousand certificates in force in Kentucky with an annual income from its business of at least fifty thousand dollars." (Bill of Complaint, Rec., p. 5; Affidavit, Rec., p. 29.)

There seems to us no "inaccuracy or inconsistency" in stating that the Receiver had taken possession of the assets, business, franchise, and contracts of the Association, but had not, at the date of the filing of appellant's bill, collected any money thereon.

(7.) The appellant has not been deprived of its property, the possession of the Receiver being that of the Jefferson Circuit Court.

"The utmost effect of the appointment is to put the property into his (the receiver's) custody as an officer of the court, for the benefit of the party ultimately proved to be entitled."

Union Bank *vs.* Kansas City Bank, 136 U. S. 234.

"The general proposition is that possession of the receiver is that of all the parties according to their titles." Lord Hargreave in *Re* Butler.

13 In. Ch. (N. S.) 456.

"The appointment of the receiver is not such as to oust any party of his right, that is, it is not adverse to either party to the action."

Beach on Receivers, sect. 236.

(8.) Further, on the right of courts of coequal, concurrent jurisdiction to impede and obstruct the proceedings of each other, see

Gumbel *vs.* Pitkin, 124 U. S. 156.

In the case cited this Court held that property in possession of a United States Marshal under an attachment, confessedly void, was nevertheless *in custodia legis* and not subject to the order, process, or seizure of a State court. This Court in that case sets forth the procedure which appellant here should have pursued.

Gumbel *vs.* Pitkin is erroneously cited by counsel for appellant. (Brief, p. 20, and Reply Brief, p. 3.)

In Evans *vs.* Gorman, 115 Fed. Rep. 403, a U. S. Circuit Court decided that under section 720 of the Revised Statutes and the comity between courts of concurrent jurisdiction, it had no power to enjoin proceedings in a State court notwithstanding the positive allegations of the bill that the State Court was without jurisdiction and acting fraudulently.

With the exception of the dicta of Hanford, D. J., in Northern Pacific *vs.* Kurtzman, 82 Fed. Rep. 243, the authorities cited by appellant do not appear to be in point.

In York *vs.* Texas, 137 U. S. 15, the injunction suggested by this Court was not one by a U. S. Court but an injunction

in the State Court. The sentence following the quotation in appellant's brief shows this.

Fitts *vs.* McGhee, 172 U. S. 516, was a proceeding against a state executive officer.

Arrowsmith *vs.* Gleason, 129 U. S.; Marshall *vs.* Holmes, 141 U. S., and Bank *vs.* Stephens, 169 U. S., where judgments of State courts were attacked for fraud, are not analogous. This, for the reason that such cases of necessity involve facts and proceedings not appearing on the face of the record and which must be alleged and proved, if at all, in a separate, independent action to be instituted in either State or Federal Court as conditions authorize.

The same criticism is made of French *vs.* Hay, 22 Wall., and Robb *vs.* Voss, 155 U. S., where the State Court judgment was assailed as having been procured on an unauthorized appearance of attorney.

A reading of the cases seems to develop the correctness of appellees' position.

"In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors or proceedings in another court; but it will scrutinize the conduct of the parties and if it finds that they have been guilty of fraud in obtaining judgment or decree, it will deprive them of the benefit of it or any inequitable advantage which they have derived under it.

"These principles control the present case which, although involving rights arising under judicial proceedings in another jurisdiction, is an original, independent suit for equitable relief between the parties; such relief being grounded *upon a new state of facts, disclosing not only imposition upon a court of justice* in procuring from it authority to sell an infant's lands where there was no necessity therefor, but actual fraud in the exercise from time to time, of authority so obtained."

Arrowsmith *vs.* Gleason.

"The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class, there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the State courts; and in the other class, the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof."

In distinguishing the case before the court and the case of Nougue *vs.* Clapp, the court said:

"For aught that appears that suit was brought simply to obtain a rehearing in the Circuit Court of the United States, setting up in equity issues that were and by proper diligence could have been fully determined in a suit at law in the State Court."

Marshall *vs.* Holmes.

Dietzch *vs.* Huidekoper, 103 U. S., was action by injunction taken in the Federal Court after a cause had been removed from the State Court. In this and similar cases, the U. S. Court does nothing more than protect its own exclusive jurisdiction. Quoting the decision:

"The bill in this case was, therefore, ancillary to the replevin suit, and was in substance a proceeding in the Federal Court to enforce its own judgment by preventing the defeated party from wresting the replevied property from the plaintiffs in replevin, who, by the judgment of the court, were entitled to it, or what was in effect the same thing, preventing them from enforcing a bond for the return of the property to them.

"A court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a State Court."

In none of the cases referred to by appellant could the orderly method of appeal to the State Court of last resort and then by writ of error to this Court have availed. In the case before the Court proceeding by writ of error, admitting that the Kentucky Court of Appeals would have denied the appellant "due process of law," was entirely adequate.

(9.) The attempt to remove the ancillary proceeding to execute the judgment never progressed farther than the tender to the Jefferson Circuit Court of a petition and bond. The record has not to this day been filed in the U. S. Circuit Court.

If appellant's bill in the instant case was intended to protect the jurisdiction of the Federal Court, as the reply brief now seeks to argue, a complete and sufficient removal should have been alleged or that fact made to appear before this Court.

Respectfully, BENJAMIN F. WASHER.

Supreme Court of the United States,

OCTOBER, 1902.

MUTUAL RESERVE FUND LIFE ASSOCIATION, - *Appellant*,

No. 263. *VERSUS*

JAMES S. PHELPS, FIDELITY TRUST & SAFETY VAULT COMPANY, - - - - - - - - - - *Appellees.*

In the case of Youngstown Bridge Company v. White's Admr., 105 Ky. 282, the Kentucky Court of Appeals passed upon a motion to quash the return of a summons, and upon holding the service insufficient ordered the judgment set aside and the return quashed, without ordering a new trial or attempting to hold the defendant in court. Th case clearly shows that the Kentucky Court of Appeals does not apply the announcement contained in Chesapeake & Ohio R. R. Co. v. Heath's Admr., 87 Ky. 660, to motions such as the appellant made in the instant case.

Volume 105 of the Kentucky Reports is not in the Library of Congress, and for this reason the case to which reference is now made could not be cited in the reply brief filed by appellees, which was prepared and printed in Washington.

Appellees submit to the court, in addition to the criticism of appellant's position found on page 60 of appellees' original brief, that the appellant, under the decision in Youngstown Bridge Company v. White, *supra*, could have secured the fullest and fairest relief in the Kentucky Court of Appeals.

Respectfully,

BENJAMIN F. WASHER,

For Appellees.

Supreme Court of the United States.

No. 263.—October Term, 1902.

The Mutual Reserve Fund Life Association, Appellant, vs. James S. Phelps and Fidelity Trust and Safety Vault Company.	Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

[May 18, 1903.]

Section 631, Kentucky statutes, 1899, (Laws 1893, chap. 171, sec. 94) reads as follows:

"Sec. 631. Before authority is granted to any foreign insurance company to do business in this State, it must file with the commissioner a resolution adopted by its board of directors consenting that service of process upon any agent of such company in this State, or upon the commissioner of insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the commissioner to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in the State."

On May 10, 1893, the appellant, The Mutual Reserve Fund Life Association, hereinafter called the association, acting under said section, by resolution of its board of directors, consented that the insurance commissioner of Kentucky should be authorized to receive service of process in any action brought or pending in Kentucky, and also that like valid service of process might be made upon every agent then or thereafter acting for it in Kentucky.

On October 10, 1899, the insurance commissioner cancelled the license which had theretofore been issued to the association, and gave it notice that from and after that date all authority granted by his department to it, and all licenses issued to the agents of the association to do business in the State of Kentucky, were revoked. And from and after that date the association had no agent or agents in the State of Kentucky and did no new business whatever in the State, but at one time, for the convenience of the holders of certificates residing in Jefferson County, permitted them

to remit dues and assessments through the Western Bank, located in the city of Louisville.

On February 28, 1900, James S. Phelps commenced an action in the Circuit Court of Jefferson County, Kentucky, against the association, alleging that on July 8, 1885, he had made application for membership in it, and that on July 16, 1885, his application had been approved and certificate of policy of insurance issued to him. Breaches of the agreement on the part of the defendant were alleged, and a judgment asked for $1,994.20. A summons was issued and served on the insurance commissioner, and an alias summons was also issued and served upon Ben Frese, as the managing agent and chief officer and agent of the association in Jefferson County. The defendant appeared specially and moved to quash the service on each summons. The motion was heard on affidavits and overruled. The defendant taking no further action, judgment was rendered on May 19, 1900, in favor of the plaintiff and against it for $1,994 with interest.

On August 4, 1900, the plaintiff filed an amended and supplemental petition, in which he alleged the filing of the original petition, the judgment, the issue of execution, a return of *nulla bona;* that the defendant had a large number of policy holders in the State who at stated times and regular intervals became indebted to it for premiums and assessments upon its policies of insurance, and prayed for a general attachment, or in lieu thereof the appointment of a receiver to take charge of the business and property of the defendant in Kentucky, and that all revenues and income accruing to it from policy holders and other debtors be ordered paid to the receiver. Upon the filing of this amended and supplemental petition the court appointed the Fidelity Trust and Safety Vault Company, the other appellee, hereinafter called the company, a receiver of all the property of the defendant in Kentucky, directed it to receive and collect all moneys and debts now owing or hereafter to accrue to the said defendant, and ordered all debtors of the association to pay to the receiver all premiums and assessments which might become due or owing to it; such receivership to continue until the judgment of the plaintiff and all costs and expenses had been paid, and then to terminate. The company qualified as such receiver and gave notice to the policy holders of the defendant.

On August 22, 1900, the association applied by petition and bond for a removal of the case to the Circuit Court of the United States for the District of Kentucky, which application was denied. It does not appear that any copy of the record was filed in the Federal court. But it commenced this suit in that court against Phelps (the judgment creditor) and the company, to enjoin them from further proceeding under the order made by the State court. The court issued an injunction, as prayed for. (103 Fed. Rep. 515.) On February 2, 1901, the defendants moved to dissolve the injunc-

tion, which motion was overruled and an appeal taken to the United States Circuit Court of Appeals for the Sixth Circuit. By that court the decision of the Circuit Court was reversed February 4, 1902, (50 C. C. A. 339; 112 Fed. Rep. 453,) and the case remanded with directions to dismiss the bill of complaint. From such decree the association appealed to this court.

Mr. Justice BREWER delivered the opinion of the Court.

Many questions were elaborately discussed by counsel both orally and in brief, but we are of the opinion that the decisions of two or three will dispose of the case. First, the service of summons on the insurance commissioner was sufficient to bring the association into the State court as party defendant. It was stipulated between the parties that the outstanding policies existing between the association and citizens of Kentucky were continued in force after the action of the insurance commissioner on October 10, 1899, and that on said policies the association had collected and was collecting dues, premiums and assessments. It was, therefore, doing business within the State. (*Mutual Life Insurance Company* v. *Spratley*, 172 U. S. 602.) The plaintiff was a citizen of Kentucky, and the cause of action arose out of transactions had between the plaintiff and defendant while the latter was carrying on business in the State of Kentucky under license from the State. Under those circumstances the authority of the insurance commissioner to receive summons in behalf of the association was sufficient. Such was the ruling of the Court of Appeals of Kentucky. (*Home Benefit Society of New York* v. *Muehl*, 22 Ky. Law. Rep. 1378; 59 S. W. Rep. 520.) In that case the society while doing business in the State issued the policy sued on, but in April, 1894, before the action was brought, ceased to do business and withdrew all of its agents. Service on the commissioner was held good. The court, in its opinion, after referring to the statute of 1870 and the change made by section 631, under which this service was made, said (p. 1379):

"It is sufficient to say that the agency created by the act of 1893 is, in its terms, broader than that created by the act of 1870. The words of the later statute express no limitation. Whatever limitation shall be applied to it must be by implication. And when we consider the purpose of the act it becomes clear that it would be frustrated by the construction contended for. There is no need of the right to serve process upon the insurance commissioner so long as the company has agents in the State, and we think the purpose of the section was to provide a means of obtaining service of process upon foreign companies which no longer had agents in the State upon whom process might be served in suits upon contracts made in this State, whatever may be held as to suits upon contracts entered into elsewhere." See also *Germania Ins. Co.* v. *Ashby*, (23 Ky. Law Rep. 1564.)

Such decision of the highest court of Kentucky, construing one of its own statutes, if not controlling upon this court, is very persuasive, and it certainly is controlling unless it be held to be merely an interpretation of a contract created by the statute. As an original question, and independently of any expression on the part of the Court of Appeals, we are of the opinion that such is the true construction. This and other kindred statutes enacted in various States indicate the purpose of the State that foreign corporations engaging in business within its limits shall submit the controversies growing out of that business to its courts, and not compel a citizen having such a controversy to seek the State in which the corporation has its home for the purpose of enforcing his claims. Many of those statutes simply provided that the foreign corporation should name some person or persons upon whom service of process could be made. The insufficiency of such provision is evident, for the death or removal of the agent from the State leaves the corporation without any person upon whom process can be served. In order to remedy this defect some States, Kentucky among the number, have passed statutes, like the one before us, providing that the corporation shall consent that service may be made upon a permanent official of the State, so that the death, removal or change of officer will not put the corporation beyond the reach of the process of the courts. It would obviously thwart this purpose if this association, having made, as the testimony shows it had made, a multitude of contracts with citizens of Kentucky, should be enabled, by simply withdrawing the authority it had given to the insurance commissioner, to compel all these parties to seek the courts of New York for the enforcement of their claims. It is true in this case the association did not voluntarily withdraw from the State, but was in effect by the State prevented from engaging in any new business. Why this was done is not shown. It must be presumed to have been for some good and sufficient reason, and it would be a harsh construction of the statute that, because the State had been constrained to compel the association to desist from engaging in any further business, it also deprived its citizens who had dealt with the association of the right to obtain relief in its courts. We conclude, therefore, that the service of summons on the insurance commissioner was sufficient to bring the association into the State court, and there being nothing else to impeach the judgment it must be considered as valid.

Again, the proceeding for the appointment of a receiver was not a new and independent suit. It was not in the strictest sense of the term a creditor's bill. It did not purport to be for the benefit of all creditors, but simply a proceeding to enable the plaintiff in the judgment to obtain satisfaction thereof, satisfaction by execution at law having been shown to be impossible by the return of *nulla bona*. It is what is known as a supplementary proceeding. It is a proceeding known to the jurisprudence of many States, and one whose validity in those States has been recognized by this court.

(*Williams* v. *Hill*, 19 How. 246; *Atlantic & Pacific Railroad Company* v. *Hopkins*, 94 U. S. 11; *Ex parte Boyd*, 105 U. S. 647; *Street Railroad Company* v. *Hart*, 114 U. S. 654.) It is recognized in some cases in Kentucky. (*Well* v. *Deposit Bank*, 18 Ky. Law Rep. 156; *Caldwell* v. *Deposit Bank*, 22 Ky. Law Rep. 684.) This proceeding was treated by the State court as one merely supplemental in its character. It was initiated by the filing of an amended and supplementary petition. It was a mere continuation of the action already passed into judgment, and in aid of the execution of such judgment. As such it was not subject to removal to the Federal court, the time therefor prescribed by the statute having passed. (24 Stat. 554; *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673–684.) Being a mere continuation of the action at law, and not removable to the Federal court, the latter had no jurisdiction to enjoin the proceedings under it. It is contended that such a supplementary proceeding is not warranted by the laws of Kentucky; that there is no statute of that State justifying it. But it has been sanctioned by the judgment of the court in which the proceeding was had, and cannot be treated by the Federal courts as unauthorized. (*Laing* v. *Rigney*, 160 U. S. 531.) See also *Leadville Coal Co.* v. *McCreery*, (141 U. S. 475, 478.) If not warranted by the law of the State relief must be sought by review in the appellate court of the State, and not by collateral attack in the Federal court.

For these reasons we think the decision of the Court of Appeals of the Sixth Circuit was right, and it is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.